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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS and
TOWN OF WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether public utilities, whose wholesale rates are regulated by a federal agency and whose retail rates are regulated by a state agency, enjoy a judicially created antitrust immunity under Section 2 of the Sherman Act when they impose a "price squeeze" upon their wholesale customers that compete with them in the same retail market.

2. Whether the court of appeals erred as a matter of law in overturning a jury finding of monopoly power in this case even though it was conceded that the defendant possessed monopoly power in both retail sales and transmission of electric power.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

The Town of Concord, Massachusetts and the Town of Wellesley, Massachusetts hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-33a) as amended is reported at 915 F.2d 17 (1st Cir. 1990). The opinion of the district court (App. 34a-46a) is reported at 721 F. Supp. 1456 (D. Mass. 1989).

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1990. On December 11, 1990, Justice Souter extended the time for filing a petition for writ of

certiorari to and including January 19, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful to "monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

STATEMENT

In this case, the court of appeals has created a sweeping new "dual regulation" defense to a price squeeze action brought under Section 2 of the Sherman Act, 15 U.S.C. § 2. This immunity, which has been expressly rejected by other federal courts of appeals, permits any regulated utility to avoid liability if both its wholesale and retail rates are subject to regulation. In addition, the court below adopted an erroneous rule requiring a plaintiff in a price squeeze action to demonstrate monopoly power in the wholesale market, even when the defendant has an admitted monopoly in retail sales. This is a stark departure from the principles prevailing in this Court and from the holding in one other circuit which permits a plaintiff to satisfy the monopoly power element of a Section 2 claim (including a price squeeze claim) by demonstrating monopoly power at *either* the retail or the wholesale levels.

To place these rulings in their proper context, it is necessary to explain in some detail the background of this litigation, as well as the devastating, immediate impact of the decision below on the petitioners.

1. *The Parties.* Petitioners are the Towns of Concord and Wellesley, Massachusetts ("Towns"). They are

municipal corporations that own and operate electric distribution systems and sell electric power at retail. Respondent Boston Edison Company ("Edison" or "BE") is an investor-owned, vertically-integrated power company which generates, transmits and sells electric power at both wholesale and retail. The Towns purchase virtually all of their power at wholesale from Edison. They have no generating facilities or power lines of their own linking them to other generating facilities. Nor is it economically feasible for them to construct new transmission lines of their own. For these reasons, they have always relied upon Edison's transmission lines to bring electricity to their distribution systems. The price the Towns pay for wholesale power from Edison constitutes three-fourths of their total costs of operations and directly affects the level of the Towns' retail rates.

Like most of the other 2000 municipally and cooperatively owned utilities that purchase their power at wholesale from large investor-owned utilities in this country, the Towns also compete—or attempt to compete—with Edison. See generally *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 930 (2d Cir. 1981). As demonstrated by the record below, this competition takes three forms. First, the Towns compete with Edison for the business of large customers (or potential customers) that are located (or are considering locating) within the Towns' service areas and have the ability, at least potentially, to switch to Edison if the Towns' retail rates increase. See App. 45a. This is sometimes called "individual customer" competition. *City of Groton*, 662 F.2d at 930. Second, the Towns compete with Edison for the business of other customers (such as Wellesley College) that are located on the boundary between service areas, and can therefore switch even more readily among providers, depending on the retail rates charged by each. App. 45a. This kind of competition is

called "fringe area competition." *City of Groton*, 662 F.2d at 930. Third, in the long run, the Towns are in competition with Edison simply to retain the ability to serve the residential customers located in the Towns' service areas, which are surrounded by Edison's retail service area. App. 45a. Obviously, if the Towns' retail rates became excessive by comparison to Edison's rates, the Towns would be forced to abandon their independent systems. This brand of competition is known as "franchise competition." *City of Groton*, 662 F.2d at 930.

Staying competitive with Edison is obviously important to the Towns. The more power the Towns sell to residential, commercial and industrial customers—*i.e.*, the more kilowatt hours of electricity there are over which the Towns' fixed costs can be spread—the lower the Towns' rates can be. But, inasmuch as the Towns purchase virtually all of their wholesale power from Edison, their ability to compete with Edison depends critically upon the relationship between Edison's retail rates and its wholesale rate, which includes a component for transmitting electricity as well as generating it.

2. *Edison's Price Squeeze.* In 1980, the Towns and Edison entered into an agreement which provided that Edison could not increase the Towns' wholesale rates prior to the time Edison had obtained an increase in its retail rates. See *Towns of Wellesley, Concord & Norwood* v. *FERC*, 786 F.2d 463 (1st Cir. 1986). Under this "sequencing" provision, the Towns' wholesale rates remained in balance with Edison's retail rates. Another provision permitted the Towns readily to acquire a small quantity of outside power without incurring an increase in Edison's wholesale rates. Early in 1984, Edison notified the Towns that it was cancelling both provisions, effective early in 1985. About this time, the Towns, after a long proceeding, were awarded a small

allocation of federal preference power from the Power Authority of the State of New York ("PASNY"). *Massachusetts Municipal Wholesale Elec. Co.* v. *PASNY*, 30 FERC ¶ 61,323 (March 27, 1985), Joint Appendix at 2845-65 (hereafter "J.A."); App. 36a.

During this period, Edison, which had been denied an allocation of PASNY power, took a number of steps which substantially impeded the Towns' ability to compete with Edison in the retail electricity market:

First, in late 1984, Edison filed a wholesale rate increase with FERC. This "S-8" increase, as it is known, increased the Towns' wholesale rate a total of 8.5%. App. 36a. Pursuant to standard FERC practice, this rate increase was permitted to go into effect, subject to later adjudication and refund. *Id.* Edison's corresponding retail rate increase was only 3.85%. J.A. 1333.[1]

Second, after July 1, 1985, when the Towns began receiving approximately five percent of their power from PASNY, Edison continued to charge them as if they were receiving 100% of their power from Edison. App. 36a. This, of course, would have had the same effect as

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[1] At the time Edison made this wholesale rate filing, it knew that it was filing for a higher profit on its wholesale sales than it earned on its retail sales. J.A. 1350-53; see J.A. 1310-11, 1334, 1337-40, 1345-46, 3490. Three years later, the FERC ruled that a substantial portion of the S-8 wholesale rate increase was unjustified. *Boston Edison Co.*, 42 FERC ¶ 61,374 (March 25, 1988), reh'g denied, 43 FERC ¶ 61,309 (May 25, 1988), aff'd, 885 F.2d 962 (1st Cir. 1989). Edison, however, continued to collect that rate through the simple expedient of refiling the same rate in a new or "pancaked" rate filing. J.A. 2734-2805. Most recently, on December 7, 1990, Edison filed a new wholesale rate that is 29 percent higher than the S-8 wholesale rate that the FERC previously found unjust and unreasonable. Thus, because of Edison's manipulation of FERC procedures, the Towns' success in having Edison's S-8 rate overturned by the FERC has failed to end Edison's price squeeze.

a wholesale rate increase of approximately five percent on the power purchased from Edison.

Third, in 1986, Edison sent the Towns a letter citing a five-year notice provision of Edison's FERC tariff and stating that, because the Towns had taken PASNY power when it became available in 1985, Edison would assess an "adverse financial impact" charge of almost $1 million against the Towns. App. 37a. This too was designed to effect a substantial increase in the wholesale charges paid for Edison power. It also had a chilling effect on efforts by the Towns to obtain power from any other source.

Fourth, also in 1986, Edison filed another new wholesale rate increase against the Towns. The new rate, known as the S-8 PR rate, incorporated Edison's old S-8 rate as a new rate, thus immunizing the rate from any change by decisions rendered in the Towns' challenge to the S-8 rate. It also increased the Towns' wholesale charges slightly. J.A. 2734-2805. This increase was not accompanied by any comparable increase in Edison's retail rates. App. 36a; see J.A. 973-74, 1359-63, 2995.

Fifth, in late 1986 and early 1987, Edison filed additional wholesale rate increases against each town, which raised their wholesale power costs an additional 4.4%. In this filing, Edison sought FERC approval to charge the Town of Wellesley $761,000 for a new piece of transformer equipment for which, according to a subsequent ALJ decision, Wellesley was not responsible. App. 37a. Again, there was no comparable corresponding increase in Edison's retail rates. J.A. 612, 662-64, 2995.

Sixth, later in 1987, Edison reduced its retail rates in response to the reduction in Edison's federal corporate tax rate that resulted from the Tax Reform Act of 1986. App. 36a. Edison, however, did not reduce its wholesale rates at that time. *Id.*

As a result of these actions by Edison, the Towns experienced an increase in their wholesale rates that was more than three times the increase in Edison's retail rates. These actions forced the Towns to raise their retail rates, including rates to their large retail customers, which made the Towns' rates higher than Edison's rates for large retail customers. They also forced the Towns to delay plant improvements and wage increases for employees. They caused the Towns to incur losses. Finally, Edison's price squeeze reduced the Towns' ability to compete with Edison in attracting new business, and in retaining existing businesses and customers. App. 37a. In sum, Edison had squeezed the wholesale and retail rates in a way that was designed to impair, and did impair, the Towns' ability to compete in the retail market.

3. *The Towns' Lawsuit.* In 1987, the Towns filed an antitrust lawsuit challenging Edison's anticompetitive actions. Among other things, the Towns asserted a monopolization claim under Section 2 of the Sherman Act. Under Judge Learned Hand's landmark decision in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), a monopolization claim has two elements: first, the defendant possesses monopoly power in a relevant market; second, the defendant has engaged in exclusionary conduct or committed other "purposeful acts" to acquire, maintain, or expand its monopoly position. See, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966) (adopting *Alcoa*).

At their jury trial, the Towns presented extensive evidence concerning Edison's market power. The Towns' experts testified that the relevant market is Edison's service area, where it provides electricity to customers at both retail and wholesale and competes with the Towns for customers. These experts demonstrated that Edison controls 98 percent of that market. The Towns also presented evidence demonstrating that Edison had monopoly power over the product submarket of "firm re-

quirements" wholesale power, upon which the Towns were dependent, and over the transmission of electricity to the Towns.

The Towns also presented extensive evidence on the second element of their monopolization claim—exclusionary conduct. Among other things, they demonstrated that Edison had taken each of the six steps, described above, to charge the Towns a higher wholesale rate in relation to costs than it does to its own retail customers. App. 35a-37a. Thus, Edison put the Towns in a price squeeze that undermined the Towns' ability to compete with Edison for retail customers. App. 41a.

After 13 days of testimony, the case was submitted to the jury. The district court propounded three special interrogatories: (1) "Do you find that plaintiffs proved the existence of a relevant market?" (2) "Do you find that defendant had monopoly power in the relevant market?" and (3) "Do you find that defendant willfully acquired or maintained that power through restrictive or exclusionary conduct?" App. 40a n.2; J.A. 394. After deliberating three days, the jury answered "Yes" to all three questions. It then returned a verdict of $13.1 million for the Towns.

4. *The District Court's Decision.* The trial court denied Edison's motion for judgment notwithstanding the verdict. A centerpiece of Edison's motion was a legal attack on the Towns' price squeeze claim. Edison argued that, because its wholesale and retail rates are regulated by federal and state authorities, respectively, Edison could not be subject to liability based on a claim that the relationship between those rates had created a price squeeze. App. 41a; see also Boston Edison Company's Memorandum in Support of Motion For Judgment Notwithstanding Verdict, pp. 9-13 ("JNOV Motion").

After observing that the Towns had presented ample evidence of a price squeeze "resulting from the interplay

of [Edison's] wholesale and retail rates" (App. 41a), the court rejected Edison's "dual regulation" defense. The court noted (App. 42a-43a) that the Eighth Circuit had rejected an "identical" legal challenge in *City of Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983).

Edison also argued that the Towns had failed to demonstrate monopoly power in a relevant market. It admitted that it had monopoly power over both retail sales and transmission. JNOV Motion at 6 ("Boston Edison . . . does have a retail monopoly in its service area"); Reply In Support Of JNOV Motion at 6-7. However, it strenuously argued that in a price squeeze case the retail market cannot, as a matter of law, constitute the relevant market. JNOV Motion at 5-6. Quoting the Third Circuit's decision in *Borough of Lansdale* v. *Philadelphia Elec. Co.*, 692 F.2d 307, 312 (3d Cir. 1982), Edison contended that " 'the question of monopoly power within the retail product market is irrelevant . . . under the 'price squeeze' theory.' " JNOV Motion at 6.

The district court rejected these arguments as well. It held that, through their expert testimony and other evidence, "the Towns presented substantial evidence from which the jury could conclude that the relevant market is [Edison's] service area . . . ." App. 41a. It observed that the relevant market, in an antitrust case such as this one, is normally the defendant's *retail* service area—*i.e.*, "the area[] in which the particular firm actually competes or operates." App. 40a (quoting *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981), aff'g 465 F. Supp. 1320, 1325 (N.D. Ind. 1979)). It further observed that this approach comports with this Court's decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 369-70 (1973). App. 40a.

5. *The Court of Appeals' Opinion.* Although Edison initially declined to make its "dual regulation" argument

on appeal, the court of appeals called for supplemental briefing on that question after oral argument. App. 47a. It then reversed the district court's decision. It held 1) that there is a "dual regulation" immunity from a price squeeze monopolization claim; 2) that an antitrust plaintiff alleging such a squeeze must demonstrate monopoly power in the wholesale market, rather than the retail or transmission market; and 3) that the Towns had failed as a matter of law to demonstrate a monopoly in the broad wholesale market defined by the court.

According to the court of appeals, "[t]he chief question raised by this appeal is whether a pricing practice known as a price squeeze violates the antitrust laws when it takes place in a fully regulated industry." App. 2a. The court then held that, subject to an undefined potential exception for "extreme circumstances," it does not. App. 2a, 11a-12a, 23a-24a. It thereby adopted the "dual regulation" immunity that had been explicitly rejected by the district court and by the Eighth Circuit in *Kirkwood*.

The panel acknowledged that it was "aware that reported opinions in three circuit courts of appeals and several district courts suggest that a price squeeze may be unlawful in the regulated electricity industry." App. 23a. The panel continued: "[W]e recognize that our reasoning and analysis differ[] significantly from that in the opinions . . . just cited." *Id.* at 24a-25a. The panel also acknowledged that in one of those cases—the Seventh Circuit's decision in *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981)—"the court actually . . . affirm[ed] a judgment against the defendants." App. 24a.

The court of appeals did not rest its holding exclusively on the immunity issue. Instead, after devoting a significant amount of effort to justifying that holding (App. 18a-25a), the court also identified "[a] second, legally fatal problem," *viz.*, that the Towns had failed to estab-

lish monopoly power in what the Court defined as the relevant wholesale market. The court acknowledged that Edison has a monopoly over transmission of electricity to the Towns (App. 25a), and Edison itself conceded that it has a monopoly over retail sales in the area where it and the Towns compete for retail customers. See *supra* page 9.

The court of appeals argued that Edison's admitted monopoly over transmission is insufficient to satisfy the monopoly power element of a Section 2 claim because, according to the court, Edison is willing to "wheel" or transmit electricity upon request. App. 25a. Moreover, the court agreed with Edison that monopoly power at the retail level is insufficient as a matter of law. It held that "a price squeeze violates Sherman Act § 2 . . . when (1) the firm conducting the squeeze has monopoly power at the *first* [*i.e.*, wholesale] industry level. . . ." App. 3a (emphasis added); see also *id.* at 25a ("price squeeze occurs when a monopolist uses its control over the *monopolized* product . . . to *obtain* a monopoly at a *second* [retail] industry level") (emphasis added). Accordingly, the court of appeals refused to give effect to the district court's holding that Edison's monopoly over retail sales within its service area was sufficient to satisfy the monopoly power element of the Towns' Section 2 claim.[2]

6. *Aftermath of the Court of Appeals' Decision.* Shortly after the court of appeals issued its decision, Edison filed with the FERC a new wholesale rate schedule, which increased the Towns' wholesale rates to a level 29% higher than the unwarranted S-8 rates. The par-

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[2] The court of appeals further held, contrary to the holding of the district court, that the Towns had failed to present evidence sufficient to sustain a jury finding of monopoly power in the wholesale market. The court rejected, with no explanation whatever, the relevant geographic market accepted by the district court. Instead, the panel concluded that, as a matter of law, the relevant market must include *all* of the "more than a dozen different power generating companies [that] sell wholesale power in New England . . . ." App. 26a.

allel increase in retail rates, however, was only 4%. Edison thereby further exacerbated the now unremedied price squeeze and extended its Section 2 violation into the foreseeable future.

REASONS FOR GRANTING THE PETITION

This petition presents two important antitrust issues that warrant review by this Court. Most obviously, the court of appeals acknowledged that its decision to create a "dual regulation" immunity from price squeeze claims conflicts with decisions in other circuits. But equally important, its holding that a plaintiff in a price squeeze case must demonstrate monopoly power at the wholesale level rather than the retail level conflicts with the decision of the Seventh Circuit in *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980) (*"Mishawaka II"*), cert. denied, 449 U.S. 1096 (1981), and conflicts in principle with this Court's decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).

The First Circuit's resolution of both issues will have an enormous practical effect on the ability of more than 2000 municipal electric companies, electric cooperatives, and similarly situated enterprises in other industries to compete with their suppliers. By ruling that a price squeeze is not exclusionary when undertaken by regulated utilities, moreover, the decision below would logically preclude any consideration by the FERC of price squeeze claims in the future, thereby negating this Court's decision in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976).

1. The court of appeals' principal holding, *i.e.*, that a public utility subject to dual regulation is entitled to immunity from price squeeze claims, presents an issue as to which there exists a square and acknowledged conflict among the circuits. The court of appeals itself stated (App. 24a-25a) that its holding was in direct conflict with the Seventh Circuit's decision affirming a price squeeze

judgment against an electric utility in *Mishawaka II*. Indeed, *Mishawaka II* expressly rejected the "dual regulation" immunity proposed by Edison and adopted by the First Circuit here.[3] The court stated:

> In this case, we are considering an industry subject to both federal and state regulation. However, we do not believe that that circumstance justifies an antitrust exemption . . . .

616 F.2d at 985. The Seventh Circuit reached a similar conclusion in rejecting the application of more traditional antitrust immunity doctrines in an earlier Mishawaka case, *City of Mishawaka* v. *Indiana & Michigan Elec. Co.*, 560 F.2d 1314 (7th Cir. 1977) ("*Mishawaka I*"), cert. denied, 436 U.S. 922 (1978).

The court below also acknowledged (App. 24a) that its "reasoning and analysis differ[] significantly from that in" a number of other opinions, including the Eighth Circuit's decision in *City of Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983), and the Second Circuit's decision in *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981). In fact, as the district court recognized (App. 42a-43a), the Eighth Circuit in *Kirkwood* squarely

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[3] Although the First Circuit acknowledged a square conflict with *Mishawaka II*, the court nonetheless weakly attempted to distinguish *Mishawaka II* on its facts. App. 24a. Both grounds for distinction rest upon false factual premises. First, as in *Mishawaka II*, the Towns presented ample evidence of exclusionary activity in addition to the price squeeze. Indeed, as the court below recognized elsewhere, the Towns presented evidence that Edison had also used its undisputed monopoly control over the transmission of electricity to put the Towns at a competitive disadvantage. App. 25a-26a. Second, as in *Mishawaka II*, the Towns showed that, in the words of the district court, "the wholesale rates [Edison] charges them are effectively higher than what [Edison] charges some of its larger retail customers." App. 37a. The court of appeals did not overturn this conclusion. It merely asserted, without any support, that it was "in doubt." App. 24a.

rejected the dual regulation immunity theory proposed by Edison and adopted by the panel below. After analyzing this Court's decisions, including *Otter Tail*, and *Conway Corp.*, and discussing the limitations on federal and state ratemaking authority, the Eighth Circuit concluded that the FERC and the state regulatory body "do not have exclusive jurisdiction over Kirkwood's price-squeeze claim." 671 F.2d at 1178. Accordingly, the court held that "a municipality's price-squeeze claim is cognizable under the antitrust laws." *Id.* at 1177 n.8.[4]

In addition, the court of appeals' analysis of the immunity issue is utterly misguided. Most fundamentally, the court of appeals ignored the well settled rule that implied antitrust immunity is "strongly disfavored," and is appropriate "only . . . in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). See also *Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 683 (1975) (immunity to be "implied only if necessary to make [the regulatory statute] work, and even then only to the minimum extent necessary") (quoting *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 357 (1963)). As the Solicitor General stated in a brief filed at the invitation of this Court in *Kirkwood*:

> [N]o implied exemption should be found in this case because . . . there is no 'clear repugnancy' between

[4] Contrary to the court of appeals' suggestion (App. 23a-24a), the fact that *Kirkwood* did not actually affirm a judgment against a regulated utility does not diminish the conflict between *Kirkwood* and the decision below. The Eighth Circuit's rejection of a "dual regulation" immunity from price squeeze claims was plainly necessary to the court's judgment reversing the district court's grant of summary judgment in favor of the utility defendant in that case. See 671 F.2d at 1177. Immunity was one of the independent grounds on which the district court had granted summary judgment. The Eighth Circuit therefore could not have reversed the judgment if it had applied the rule adopted by the First Circuit in the decision below.

> the Federal Power Act and the application of the Sherman Act to the conduct at issue. There is no indication in the language or legislative history of the Federal Power Act that it was intended to authorize a price squeeze. Nor is there any inherent inconsistency between the requirement of the Federal Power Act that rates be 'just and reasonable' and the application of Section 2 of the Sherman Act to price squeezes. Thus, as in *Otter Tail*, the conduct at issue here remains subject to the Sherman Act.

Brief for the United States as Amicus Curiae, No. 81-2278 at 9-10, *Union Elec. Co.* v. *City of Kirkwood* (December 1982) (footnotes omitted).

The court of appeals' holding also rests upon an erroneous view of the proper role, as well as the limitations, of rate regulation at the state and federal levels. The court of appeals' conclusion that a price squeeze is rarely anticompetitive in a regulated industry was based in large measure upon the court's view that dual regulation minimizes the competitive harm that can be done by a price squeeze. App. 18a-25a. But that conclusion ignores three crucial facts.

First, there are wide "gaps" in the authority of the two regulatory systems. As the Eighth Circuit correctly observed in *Kirkwood*, the FERC and the state regulatory agency "each has authority over only one end of the alleged price squeeze." 671 F.2d at 1178. And, as the Department of Justice observed to this Court in *Kirkwood*, "[a]ll that FERC can do prospectively is to adjust the wholesale rate within the zone of reasonableness." Brief for the United States, *supra*, at 12. "If this is inadequate to remedy a price squeeze," the Department continued, "FERC cannot compel a utility to file higher retail rates." *Id.* By the same token, a state regulatory body cannot order the utility to file lower wholesale rates. Therefore, as the Eighth Circuit correctly reasoned, only "the antitrust laws can address the entire problem." *Kirkwood*, 671 F.2d at 1178.

Second, a regulated electric utility can easily circumvent a finding by the FERC that its wholesale rates are unjust and unreasonable—and continue a price squeeze against a competing distributor—simply by making a new, "pancaked" rate filing. *E.g.*, *Mishawaka II*, 616 new, "pancaked" rate filing. *E.g.*, *Mishawaka II*, 616 F.2d at 982. Indeed, that is precisely what happened here even though the FERC held that Edison's original S-8 wholesale rate was unjustified. See *supra* note 1. Despite the FERC's decision, Edison has continued to collect its originally-filed wholesale rate for more than six years. Thus, Edison's own actions illustrate the recent observation of the district court in *Cities of Anaheim* v. *Southern California Edison Co.*, 1990-2 Trade Cases (CCH) ¶ 69,246 at 64,900 (C.D. Cal. 1990): "By manipulating the timing and amount of its rate filings, it is possible for the utility to ensure that the rates of its wholesale customers are unjustifiably high in relation to the rates of its retail customers."

Third, the FERC never considers the issue of anticompetitive intent essential to a § 2 violation (*Missouri Power & Light Co.*, 5 FERC ¶ 61,086 at 61,140 n.17, 61,141 (Oct. 27, 1978)), and never reviews the level of wholesale rates *as filed* under its limited price squeeze powers. *Southern California Edison Co.*, 40 FERC ¶ 61,371 at 62,168 (Sept. 30, 1987); see *Arkansas Power & Light Co.*, 8 FERC ¶ 61,131 at 61,510 (Aug. 6, 1979). As the D.C. Circuit has noted, these are matters left to the traditional remedy of the antitrust laws. *Cities of Batavia* v. *FERC*, 672 F.2d 64, 88-89 (D.C. Cir. 1982). These two matters were essential elements of the Towns' claims against Edison.

In sum, the dual regulatory system provides an "obvious, ready made illegal opportunity with a legitimate gloss." *Mishawaka II*, 616 F.2d at 983-84.[5] For that

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[5] See also R. Bork, *The Antitrust Paradox* 347 (1978) ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition.").

reason, both the Seventh and Eighth Circuits, as well as the Department of Justice, have squarely rejected the position of the court below that dual regulation renders antitrust price squeeze actions unnecessary. As the Department stated in its *Kirkwood* brief, "the availability of antitrust relief provides a *necessary* complement to FERC's limited power to remedy a price squeeze." Brief for the United States, *supra*, at 12 (emphasis added).

2. Obviously aware of the breadth and importance of its holding on the immunity question, the court of appeals apparently attempted to find a less sweeping, alternative basis for reversing the district court's decision. It thus held, almost as an afterthought, that the Towns had failed to satisfy the monopoly power element of a monopolization claim. Given Edison's *admitted* monopoly power in both retail sales and in transmission of electricity (*supra* page 9), this is a remarkable holding. It also presents significant legal issues that independently warrant review by this Court.

Most important, the court of appeals' preliminary holding that a plaintiff in a price squeeze suit must show monopoly power at the wholesale level further solidified a conflict among the circuits. As Edison correctly argued below (*supra* page 9), the Third Circuit has held that, in a price squeeze action, "the question of monopoly power within the retail product market is irrelevant . . . ." *Borough of Landsdale* v. *Philadelphia Elec. Co.*, 692 F.2d 307, 312 (3d Cir. 1982). Accordingly, that court held that the "inquiry need focus only on the definition of the relevant geographic market for wholesale power." *Id.* As a result of the decision below, this position has now become the law of the First and Third Circuits.[6]

The Seventh Circuit held in *Mishawaka II* that establishment of monopoly power at *either* the wholesale or

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[6] Of course, the more basic holding in *Lansdale*—that definition of the relevant geographic market is an issue for the jury—directly conflicts with the holding of the First Circuit below taking this issue from the jury. See *infra* note 7.

retail level satisfies the monopoly power requirement of Section 2. There, the district court found that the plaintiffs had produced evidence tending to show that the "defendants possess monopoly power in two respects"—"retail sales of electricity" and "the supply of electric power . . . on which the plaintiffs depend to serve their customers and to compete with [defendant] for retail sales." *City of Mishawaka* v. *American Elec. Power Co.*, 465 F. Supp. 1320, 1325 (N.D. Ind. 1979). The court then held that "[e]stablishment of either monopoly brings the monopolization provision of Section 2 into operation." *Id.* With the sole exception of damage calculations, the Seventh Circuit affirmed all of the district court's holdings. 616 F.2d at 980, 985.

The First Circuit's insistence on a showing of monopoly power at the wholesale level squarely conflicts with the prevailing rule in the Seventh Circuit. This conflict was explicitly noted recently by the district court in *Cities of Anaheim*, 1990-2 Trade Cases ¶ 69,246 at 64,899 (contrasting the approaches of *Mishawaka* and *Lansdale*; acknowledging confusion in applying traditional antitrust analysis to price squeeze claims).

The rule applied by the court below is wrong as a matter of law, quite aside from the court of appeals' erroneous analysis of Edison's monopoly power at the wholesale level.[7] First, the court of appeals' requirement of a

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[7] The court of appeals' analysis of Edison's monopoly power at the wholesale level rested largely upon the court's redefinition of the relevant market. See *supra* note 2. Numerous other courts of appeals, however, have held that the definition of the market is a question for the jury to decide. See, *e.g.*, *Lansdale*, 692 F.2d at 311-12; *Syufy Enter.* v. *American Multicinema, Inc.*, 793 F.2d 990, 994 (9th Cir. 1986), cert. denied, 479 U.S. 1031 (1987); *Weiss* v. *York Hospital*, 745 F.2d 786, 825-26 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985); *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1348-50 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981). As the district court recognized, moreover, courts (and juries) in similar cases have typically defined the relevant whole-

wholesale monopoly is contrary to *Otter Tail*. There, this Court held that an integrated power company with a monopoly at the retail level violated Section 2 by unlawfully preserving its retail monopoly when it excluded potential rivals from "obtaining electric power from outside sources of supply." 410 U.S. at 377. Significantly, neither this Court nor the district court so much as hinted that a finding of monopoly power at any other level was necessary before the plaintiffs could make out a violation of Section 2. See *United States* v. *Otter Tail Power Co.*, 331 F. Supp. 54, 58-59 (D. Minn. 1971) (finding defendant has monopoly in sale of electric power at retail; relevant geographic market is defendant's service area), aff'd, 410 U.S. at 369-70 & n.1. In contrast to the decision below, the Seventh Circuit's holding that a retail monopoly satisfies the monopoly power element of Section 2 is fully consistent with *Otter Tail*.

Second, the rule adopted by the court below ignores the fact that a price squeeze may be implemented to preserve an existing retail monopoly as well as to extend an existing wholesale monopoly to the retail level. In the *Alcoa*-type case where a plaintiff demonstrates monopoly in the wholesale market, evidence of a price squeeze

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sale market in precisely the way the First Circuit says it may not be defined in this case. See App. 40a-41a (citing *Otter Tail*, *supra*; *Mishawaka II*, *supra*).

In addition, the court of appeals' analysis of Edison's monopoly power at the wholesale level depends upon the same misguided view of the ability of federal and state rate regulation to curb the acquisition and exercise of monopoly power. Thus, the court ignored the exclusionary power of respondent's "adverse impact" charge because the Towns "remain free to challenge before FERC any unreasonably high charge that Edison might try to assess under this provision." App. 28a. Because the court of appeals' analysis of Edison's wholesale monopoly power is so closely tied to its analysis of Edison's proposed dual regulation defense, a reversal of the court of appeals' holding with respect to the latter issue also would lead to a reversal of the holding with respect to monopoly power.

tends to show that the defendant purposefully and willfully *abused* its monopoly position in the wholesale market in an effort (whether successful or not) to acquire market power in the retail market. See, *e.g.*, *Alcoa*, 148 F.2d at 437-38; *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 31 & n.43 (3d Cir.), cert. denied, 439 U.S. 876 (1978); see also *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927); *Industrial Bldg. Materials, Inc.* v. *Interchemical Corp.*, 437 F.2d 1336, 1342 (9th Cir. 1970).

However, where (as here) a plaintiff who competes with the defendant at the retail level demonstrates that the defendant has monopoly power at that level, a price squeeze serves the same function as did the refusal to deal and the denial of access to an "essential facility" in *Otter Tail*: it shows an intent unlawfully to *maintain* the defendant's retail monopoly against encroachment from a competitor. *E.g.*, *Otter Tail*, 410 U.S. at 377 (willful maintenance of retail monopoly power sufficient to satisfy "purposeful act" element); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) ("willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"). Edison's admitted monopoly over retail sales in its service area, therefore, is sufficient to satisfy the monopoly power element of the Towns' Section 2 claim.

The court below also erred in concluding that Edison's admitted monopoly over transmission is insufficient to satisfy the monopoly power requirement of Section 2. The charges Edison imposes for the transmission services it provides to the Towns are included in its wholesale rates. J.A. 1197-1204, 1244-46, 3388-89, 3472-88. Any manipulation of Edison's wholesale rates for anticompetitive or exclusionary purposes, therefore, represents an abuse of Edison's transmission monopoly as well as its monopoly over wholesale sales of the electric power it generates.

See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

The court of appeals attempted to circumvent the legal effect of Edison's admitted transmission monopoly by claiming that "Boston Edison will 'wheel' (*i.e.*, transmit) electricity from other producers to any distributor upon request, all for a nominal transmission charge that no one claims is unreasonably high." App. 25a-26a. This claim misses the point. Even if the court of appeals' characterization were true, the fact that Edison refrained from abusing its transmission monopoly in one way—*i.e.*, by refusing to deal, as in *Otter Tail*—does not absolve it of liability for abusing its transmission monopoly in another way—*i.e.*, by imposing a price squeeze on the Towns.

In this respect, the court of appeals' analysis stands in stark contrast to the analysis of the Second Circuit in *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981). In that case, the court of appeals expressly held that the utility had willingly wheeled electricity over its transmission system. See 662 F.2d at 932-33. Nevertheless, the court held that a price squeeze was a separate abuse of the utility's monopoly power that could properly give rise to a claim under Section 2. *Id.* at 934; see also *City of Chanute* v. *Kansas Gas & Elec. Co.*, 754 F.2d 310 (10th Cir. 1985) (municipalities allowed to proceed on antitrust claims even though utility was willing to wheel electricity).

In sum, previous decisions of other courts of appeals applying *Otter Tail* have correctly held that a demonstration of monopoly power in retail electric sales or in electricity transmission is sufficient, as a matter of law, to satisfy the monopoly power element of a Section 2 claim. Those courts have made it clear that proof of a wholesale monopoly is not required. Accordingly, the court of appeals' holding that the Towns' proof on this issue was insufficient presents a square conflict in the in-

terpretation of Section 2 that warrants review by this court.

3. The issues presented by the decision below are of great practical importance. Of most immediate concern to the Towns is the fact that Edison, in the wake of the court of appeals' decision, has implemented a new wholesale price increase of over 29 percent above the unjustified S-8 filing, far more than the 4% increase in Edison's retail rates. It will therefore make it virtually impossible for the Towns to compete with Edison at retail for existing or new customers. Indeed, it will threaten the very viability of their electric distribution operations.

Aside from its immediate, devastating effect on the Towns, the decision below, by endorsing a sweeping implied immunity to Section 2 liability, will have far-reaching effects on the economy and the development of antitrust law nationwide. In principle, the court of appeals' decision forecloses price squeeze claims against interstate natural gas transmission companies and many communications companies (in particular, the so-called "local exchange carriers") as well as electric utilities. At a minimum, therefore, it will place all of the more than 2000 municipal and cooperative electric companies that compete with their principal suppliers at a severe competitive disadvantage. Today, those companies serve approximately 62 million customers. See Public Power, 1991 Directory Issue, at 53. The decision below will also prevent Section 2 price squeeze actions by federal and state governments as well as private parties. And it will undermine this Court's decision in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), by undermining the legal basis for consideration of price squeeze claims by the FERC.

Similarly, the court of appeals' requirement that a plaintiff in a Section 2 price squeeze action must always demonstrate monopoly power at the wholesale level will effectively immunize many companies with retail and transmission monopolies from Section 2 scrutiny. Be-

cause there is no legitimate basis for permitting a monopolist to maintain or abuse its monopoly power by squeezing out its retail competitors, this holding of the court of appeals also warrants review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 22, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

No. 89-1872

TOWN OF CONCORD, MASSACHUSETTS, *et al.*,
Plaintiffs, Appellees,

v.

BOSTON EDISON COMPANY,
Defendant, Appellant.

Heard April 5, 1990

Decided Sept. 21, 1990

William L. Patton with whom Robert J. Stillman, Ropes & Gray, Boston, Mass., George F. Bruder, Carmen L. Gentile, Bruder, Gentile & Marcoux, Washington, D.C., John J. Desmond, III and Jeffrey N. Stevens, Boston, Mass., were on brief, for defendant, appellant.

Charles F. Wheatley, Jr., with whom Don Charles Uthus, Peter A. Goldsmith, Annapolis, Md., Timothy P. Ingram, Arlington, Va., Pace J. McConkie, Allen D. Freemyer, Wheatley & Ranquist, Salt Lake City, Utah, Charles R. Parrott, Nutter, McClennen & Fish, Boston, Mass., Albert S. Robinson, and Grindle, Robinson & Kertzman, Wellesley, Mass., were on brief, for plaintiffs, appellees.

Before BREYER, Chief Judge, and CAMPBELL and SELYA, Circuit Judges.

BREYER, Chief Judge.

The chief question raised by this appeal is whether a pricing practice known as a price squeeze violates the antitrust laws when it takes place in a fully regulated industry.

To understand the nature of a price squeeze the reader must keep three basic facts in mind. First, a firm can engage in a price squeeze only if it operates at two levels of an industry, and only if its competitors at one level are also its customers. Alcoa, the defendant in a famous antitrust case, provides an example of such a firm. *See United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945) (*Alcoa*). For several decades, Alcoa controlled the domestic production of almost all of America's aluminum ingot. It sold its ingot to independent fabricators, some of whom turned the ingot into aluminum sheet; it also fabricated sheet itself. Both Alcoa and the independents sold the finished sheet to the same group of consumers. Alcoa, therefore, operated at two levels of the aluminum business—ingot production and sheet production—and it competed with its customers (the independent sheet fabricators) at the second level.

Second, a price squeeze occurs when the integrated firm's price at the first level is too high, or its price at the second level is too low, for the independent to cover its costs and stay in business. Suppose, hypothetically, that Alcoa's price for ingot was $100 per ton; that the independents' costs of fabricating ingot into sheet was $50 per ton; and that Alcoa's price for sheet was $145 per ton. Under these circumstances, the independents, with ingot costs of $100 and fabricating costs of $50, would have no "room" to make a profit, for they could not charge more than $145 for sheet without losing all of their business to Alcoa. Alcoa's prices of $100 for in-

got and $145 for sheet would squeeze the independents out of business.

Third, Judge Learned Hand, in *United States v. Aluminum Co.*, *supra*, wrote that a price squeeze violates Sherman Act § 2, 15 U.S.C. § 2(a), when (1) the firm conducting the squeeze has monopoly power at the first industry level, (2) its price at this level is "higher than a 'fair price,'" and (3) its price at the second level is so low that its competitors cannot match the price and still make a "living profit." *See id.* at 437-38. Other courts, using substantially similar language, have reached the same conclusion. *See, e.g., Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 808-11 (3d Cir. 1984), *cert. denied*, 477 U.S. 908, 106 S.Ct. 3284, 91 L.Ed.2d 572 (1986); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 (2d Cir.1977); *Carl Hizel & Sons, Inc. v. Browning-Ferris Indus., Inc.*, 600 F.Supp. 161, 161-62 (D.Colo. 1985).

This case raises a narrow question about the price squeeze theory of antitust liability: does Sherman Act § 2 forbid a governmentally regulated firm with *fully regulated* prices—prices that are regulated at both industry levels—from asking regulators to approve prices that could create a price squeeze? Despite language in some cases suggesting that the answer is yes, *see* pp. 28-29, *infra*, our analysis of the likely effects of a price squeeze in a fully regulated industry leads us to conclude that the answer is no. Effective price regulation at both the first and second industry levels makes it unlikely that requesting such rates will ordinarily create a serious risk of significant anticompetitive harm. At the same time, regulatory circumstances create a significant risk that a court's efforts to stop such price requests will bring about the very harms—diminished efficiency, higher prices—that the antitrust laws seek to prevent. We conclude, therefore, that price regulation will, in most cases, pre-

vent a price squeeze from constituting an "exclusionary practice" of the sort that Sherman Act § 2 forbids.

We also conclude that, regardless, the plaintiffs in this particular case did not demonstrate the existence of an unlawful exclusionary practice, for evidence does not support a critical jury finding. It does not show that the defendant, Boston Edison, possessed monopoly power in the primary product market.

For these reasons, we reverse a judgment in favor of the plaintiffs.

I

Background

The private firms that supply American homes and businesses with electricity are called "investor-owned utilities." Most of these firms are fully integrated, operating at all three levels of the electric power industry: (1) they *produce* (or generate) electricity, (2) they *transmit* electricity from generators to local distributors, and (3) they *distribute* electricity at the local level. *See generally* Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, in *Antitrust and Regulation* 175-78 (F.M. Fisher ed. 1985) [hereinafter *Joskow*]; Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Colum. L. Rev. 64, 67-69 (1972) [hereinafter *Meeks*]. Despite being fully integrated, these firms typically do not distribute only electricity that they themselves have generated. Rather, in many parts of the country, groups of firms have formed power "pools" through which they coordinate the generation, transmission, and distribution of electricity throughout a large geographical area. These pooling arrangements aim to enhance reliable and efficient electric service by matching customer demands (which change minute by minute) with available low-cost supply sources. As a result of power pooling, an

integrated utility will often wind up distributing electricity generated by a different, interconnected company. *See generally* 16 U.S.C. § 824a-1 (governing pooling agreements); *New England Power Pool Agreement*, 56 F.P.C. 1562 (1976) (describing the New England Power Pool), *petitions for review denied*, *Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978); C. Phillips, Jr., *The Regulation of Public Utilities* 585-92 (1988) (discussing coordination among electric utilities) [hereinafter *C. Phillips*]. Even in the absence of explicit pooling arrangements, the many physical interconnections among American utilities, combined with the tendency of electricity to flow instantaneously along interconnected lines to wherever it is demanded, make it likely that electricity distributed by one utility will be supplied by another. One legal consequence of these interconnections and pooling arrangements is that most electricity flows "interstate," permitting federal, as well as state, regulation of electricity. *See Cincinnati Gas & Elec. Co. v. FPC*, 376 F.2d 506, 507-09 (6th Cir.), *cert. denied*, 389 U.S. 842, 88 S.Ct. 77, 19 L.Ed.2d 106 (1967); *Public Serv. Co. v. FPC*, 375 F.2d 100 (7th Cir.), *cert. denied*, 387 U.S. 931, 87 S.Ct. 2054, 18 L.Ed.2d 992 (1967); *see generally FPC v. Florida Power & Light Co.*, 404 U.S. 453, 92 S.Ct. 637, 30 L.Ed.2d 600 (1972).

Investor-owned utilities of the type we have described supply approximately 75% of the nation's electricity. The remainder is supplied by government- and consumer-owned systems. Unlike their investor-owned counterparts, these systems tend *not* to be integrated. The federal government, for example, generates about 10% of the nation's electricity (at systems such as the Tennessee Valley Authority), but sells most of it to independent distributors. Approximately 2,000 municipalities and cooperatives own small-scale distribution companies, but only a handful generate their own electricity; most purchase the electricity they distribute from investor-owned

utilities or from the federal government. In contrast to investor-owned systems, municipal systems typically enjoy generous tax and financing subsidies and substantial freedom from regulation. *See generally Joskow* at 175-78; Joskow and Schmalensee, *Markets for Power: An Analysis of Electric Utility Deregulation* 17-20 (1983); Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 UCLA L.Rev. 563, 568 & n. 29 (1984) [hereinafter *Lopatka*]; *Meeks*, 72 Colum. L.J. at 67-69.

The record before us reveals facts typical of the national pattern. The defendant, Boston Edison, is a fully integrated investor-owned utility. It belongs to the New England Power Pool ("NEPOOL"). It transmits electricity (either self-generated or, *e.g.*, secured from other NEPOOL members) to 52 cities and towns in eastern Massachusetts. Each of these towns has only one distribution system serving all of the towns' inhabitants. In 39 of the towns, Edison owns the distribution system. In the remaining towns, either the town itself or another utility owns the distribution system. Concord and Wellesley, the plaintiffs, are two of the towns that own their own distribution systems. They take all of their electricity over Edison's transmission lines, and buy most of it directly from Boston Edison.

Edison's rates are completely regulated. The Federal Energy Regulatory Commission ("FERC," or the "Commission") regulates the rates that Edison charges when it sells electricity at "wholesale" (*i.e.*, when it sells electricity to other firms, including municipal distributors, for resale to final customers). *See* 16 U.S.C. § 824 (regulating the "transmission . . . and . . . sale of electric energy at wholesale in interstate commerce"). Before Edison can increase its rates, it must publish the new rates in the Federal Register and give notice of the proposed increase to each of its wholesale customers. *See* 18 C.F.R. § 35.8 (1990). If an interested party raises a

legitimate question about the rate increase, FERC normally will suspend the new rates for up to five months, investigate them, and, if it has not completed its investigation by then, permit them to take effect *subject to refund* in the event it ultimately rejects them. *See* 16 U.S.C. § 824d(d, e). Similarly, the Massachusetts Department of Public Utilities ("DPU") regulates the "retail" rates that Boston Edison charges to consumers in the 39 cities and towns in which it distributes electricity. *See* M.G.L. c. 164, §§ 93-94G. In contrast, as we mentioned earlier, no agency regulates the retail rates that municipal distributors, such as Concord and Wellesley, charge to their customers, for these distributorships are non-profit entities indirectly controlled (through the ballot) by the very customers they serve.

Between 1984 and 1987, Edison filed a series of wholesale rate increases with FERC. Wellesley and Concord vigorously opposed those rate increases before the Commission. In each case, after briefly suspending the rates, the Commission allowed them to take effect subject to refund. The towns sought judicial review of FERC's decisions. Eventually, with one exception not relevant here, *see Towns of Wellesley, Concord and Norwood v. FERC*, 786 F.2d 463 (1st Cir.1986), this court upheld as lawful the relevant FERC determinations, *see Towns of Concord and Wellesley v. FERC*, 844 F.2d 891 (1st Cir. 1988); *Boston Edison Co. v. FERC*, 885 F.2d 962 (1st Cir. 1989).

Concord and Wellesley then attacked the same wholesale rate increases on another legal front. They brought this antitrust action in federal district court. They pointed out that these *wholesale* rate increases filed with FERC were not matched by corresponding *retail* rate increases. Thus, over a three-year period, Edison's rates to Concord and Wellesley increased while its rates to its own retail customers in the 39 towns surrounding Con-

cord and Wellesley stayed roughly the same. The effect of this disparity, said Concord and Wellesley, was to put the two towns in a price squeeze. If they did not raise their own retail rates to reflect the higher cost of buying electricity from Edison, they would make less money; but if they raised their retail rates while Edison's stayed the same, customers for whom they and Edison compete (say, a small manufacturer with high energy costs) might decide to forego Concord and Wellesley and settle in a town served by Edison. In light of the resulting potential harm to their electricity distributing businesses, Concord and Wellesley argued that the wholesale price increases, in the absence of corresponding retail price increases, amounted to unlawful monopolization. *See* Sherman Act § 2, 15 U.S.C. § 2(a). A jury agreed, and the district court declined to overturn its verdict. *See Town of Concord v. Boston Edison Co.*, 721 F.Supp. 1456 (D.Mass. 1989). We disagree with the district court, and we reverse the judgment.

II

The Price Squeeze

The basic legal principles that govern this monopolization case are well settled. Even though Boston Edison is a regulated firm, it has no blanket immunity from the antitrust laws. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75, 93 S.Ct. 1022, 1027-28, 35 L.Ed.2d 359 (1973); *see also Cantor v. Detroit Edison*, 428 U.S. 579, 596 n. 35, 96 S.Ct. 3110, 3120 n. 35, 49 L.Ed.2d 1141 (1976); *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59, 93 S.Ct. 1870, 1877-78, 36 L.Ed. 2d 635 (1973). The antitrust law relevant in this case makes it unlawful for a firm to "monopolize . . . any part of the trade or commerce among the several States." Sherman Act, § 2, 15 U.S.C. § 2(a). To prove a violation of this statute, a plaintiff must demonstrate (1) that the defendant possesses "monopoly power in the relevant

market," and (2) that the defendant has acquired or maintained that power by improper means. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983). Like many courts and commentators, we refer to improper methods of acquiring or maintaining monopoly power as "exclusionary conduct." Borrowing from Professors Areeda and Turner, we have defined "exclusionary conduct" as " 'conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.' " *Barry Wright*, 724 F.2d at 230 (quoting 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 626, at 83 (1978) [hereinafter *Areeda & Turner*]).

We shall assume for now that Edison has monopoly power in a relevant market and begin by examining whether Edison's pricing practices amount to exclusionary conduct. Traditional antitrust principles will guide our analysis. We shall compare the challenged practice's likely anticompetitive effects with its potentially legitimate business justifications. *See Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed. 2d 780 (1989); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 10 (1st Cir.1987); *Meeks*, 72 Colum. L.J. at 80. In doing so, we shall bear in mind that a practice is not "anticompetitive" simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is "anticompetitive" only if it harms the competitive process. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89, 97 S.Ct. 690, 697-98, 50 L.Ed.2d 701 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962); *Clamp-All*, 851 F.2d at 486.

It harms that process when it obstructs the achievement of competition's basic goals—lower prices, better products, and more efficient production methods. *See, e.g., Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794 (1st Cir.1988); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 228-29 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 379 (7th Cir. 1986), *on denial of r'hrg*, 802 F.2d 217, *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987); *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 315 (8th Cir.1986); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1728, 100 L.Ed.2d 192 (1988); *see also Reiter v. Sonotone*, 442 U.S. 330, 343, 99 S.Ct. 2326, 2333, 60 L.Ed.2d 931 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.' ") (quoting R. Bork, *The Antitrust Paradox* 66 (1978)); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500-01, 60 S.Ct. 982, 996-97, 84 L.Ed.2d 1311 (1940) ("Restraints on competition" do not constitute antitrust violations unless they "have or [are] intended to have an effect upon prices in the market or otherwise . . . deprive purchasers or consumers of the advantages which they derive from free competition").

Finally, we shall take account of the institutional fact that antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable and therefore cannot always take account of every complex economic circumstance or qualification. *See Barry Wright*, 724 F.2d at 234. (Indeed, the need for clarity and administrability sometimes leads to *per se* rules that prohibit inquiry into the actual harms and benefits of challenged conduct. *See Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545

(1958).) They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.

These last-mentioned administrative considerations are particularly important when courts apply antitrust law to a regulated industry. That is because "regulation" and "antitrust" typically aim at similar goals—*i.e.*, low and economically efficient prices, innovation, and efficient production methods—but they seek to achieve these goals in very different ways. Economic regulators seek to achieve them *directly* by controlling prices through rules and regulations; antitrust seeks to achieve them *indirectly* by promoting and preserving a process that tends to bring them about. An antitrust rule that seeks to promote competition but nonetheless interferes with regulatory controls could undercut the very objectives the antitrust laws are designed to serve. Thus, where regulatory and antitrust regimes coexist, *see, e.g., Otter Tail*, 410 U.S. at 372, 93 S.Ct. at 1027 (electric industry); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352, 83 S.Ct. 1715, 1735, 10 L.Ed.2d 915 (1963) (bank mergers), antitrust analysis must sensitively "recognize and reflect the distinctive economic and legal setting" of the regulated industry to which it applies. Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 565 (1977) [hereinafter *Watson & Brunner*]; *see generally Meeks, supra.*

For reasons we shall now set out, these principles lead us to conclude that a price squeeze of the sort at issue here does not ordinarily violate Sherman Act § 2 where the defendant's prices are regulated at both the primary and secondary levels. In so holding, we *are not* saying either that the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere. Rather, we are saying that, in light

of regulatory rules, constraints, and practices, the price squeeze at issue here is not ordinarily exclusionary, and, for that reason, it does not violate the Sherman Act. *Cf.* 1 *Areeda & Turner* ¶ 223d, at 140 (noting that "antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation"); *Watson & Brunner*, 22 Antitrust Bull. at 560 (warning that "the dogmatic transposition of monopolization concepts from conventional market settings to regulated industries" may produce results inimical to the goals of antitrust). We reach this conclusion by (1) analyzing the ordinary price squeeze, (2) comparing it to the "regulatory" price squeeze, and (3) noting that regulation makes a critical difference in terms of antitrust harms, benefits, and administrative considerations.

A. Price Squeeze Liability in an Unregulated Industry

To explain our conclusion, we must first discuss the ordinary price squeeze case, the case of an unregulated monopolist whose prices (at, say, the wholesale and retail levels) leave inadequate room for an independent competitor (at, say, the retail level) to survive. Only if the reader understands the major antitrust harms, benefits, and administrative considerations in that ordinary case, and sees how they are rather evenly balanced, will he understand why price regulation tips that balance so significantly towards legality. *Cf.* 3 *Areeda & Turner* ¶ 729c, at 235-38 (arguing that *Alcoa* overstated the harms, understated the benefits, and disregarded significant administrative burdens associated with the ordinary price squeeze).

The antitrust argument against the price squeeze typically begins by observing that a "one-level" monopolist engaged in a prolonged price squeeze may drive independent competitors out of business and thereby extend its monopoly power to a second industry level. This

fact alone, however, does not mean that a price squeeze is anticompetitive. Merely eliminating competitors is not necessarily anticompetitive, for, as we explained earlier, even legitimate business activity that succeeds in helping a firm will likely disadvantage the firm's competitors. *See* pp. 21-22, *supra*, and cases cited. Moreover, the extension of monopoly power from one to two levels does not *necessarily*, nor in an *obvious* way, give a firm added power to raise prices. As several members of the Supreme Court have pointed out, a "widely accepted" (albeit "counterintuitive") economic argument supports the conclusion of many commentators that "there is but one maximum monopoly profit to be gained from the sale of an end-product," 3 *Areeda & Turner* ¶ 725b at 199. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 36, 104 S.Ct. 1551, 1570, 80 L.Ed.2d 2 (O'Connor, J., concurring in the judgment); *see also* R. Bork, *The Antitrust Paradox* 229 (1978) ("[V]ertically related monopolies can take one monopoly profit") [hereinafter *R. Bork*]; R. Posner & F. Easterbrook, *Antitrust* 870 (2d ed. 1989) ("There is only one monopoly profit to be made in a chain of production."). (For an intuitive explanation of this "counterintuitive" argument, see Appendix A to this opinion.) What difference does it make, one might ask, whether the monopolist obtains this "maximum monopoly profit" by controlling two industry levels or just one?

At least two arguments have been made in answer to this question. The first is that a monopolist who extends his monopoly to a second industry level raises "entry barriers," thereby fortifying his monopoly position. Assume, for example, that Alcoa has monopolized only ingot production and has raised its prices somewhat above the competitive level. Alcoa's monopoly position in ingot will no doubt deter some new firms from entering ingot production, but it might also attract some new firms hoping to obtain a share of Alcoa's supercompetitive profits. Now assume Alcoa extends its monopoly to sheet produc-

tion as well, the industry level, say, that consumes most of Alcoa's ingot. New firms might now be more reluctant to enter *ingot* production, fearing that Alcoa, in its capacity as "sheet fabricator-monopolist," would refuse to buy ingot from the new ingot producer, or that it would drop its own ingot prices and take the industry's entire "single monopoly profit" from the sale of sheet. The new firm might conclude that the only prudent way to challenge Alcoa would be to enter the industry at *both* levels at once. Insofar as it is more difficult for a firm to enter an industry at two levels than at one, the monopolist, by expanding its monopoly power, has made entry by new firms more difficult. And insofar as the monopolist previously set prices cautiously to avoid attracting a competitive challenge, the added security of a two-level monopoly could even lead that monopolist to raise its prices. *See* 3 *Areeda & Turner* ¶ 725h, at 204-08; *see also id.* ¶ 1011, at 243-54; Shepherd, *Potential Competition Versus Actual Competition*, 42 Admin.L.Rev. 5-34 (1990).

The second argument against permitting extension of monopoly power concerns "non-price" competition. The existence of competitors at a second "level", irrespective of their effects upon price, provides an added incentive for the monopolist to develop better products and better, more efficient ways to produce the product. *See* 2 *Areeda & Turner* ¶¶ 402b2-402b3, at 269-70; *id.* ¶ 403c, at 272 & n. 3; 3 *Areeda & Turner* ¶ 725g, at 204. Indeed, a "second-level" independent firm that develops better products or more efficient production methods may thereby obtain the strength needed to challenge the monopolist at the "primary level."

We recognize that there are other arguments one might make about the possible anticompetitive effects of a price squeeze. *see generally* 3 *Turner & Areeda* ¶¶ 725e-725f, at 201-04 (reviewing other arguments); and we realize, as well, that scholars dispute the practical significance of the two arguments just made. *Compare* 3 *Areeda &*

Turner ¶¶ 725g-725h, at 204-08 *with R. Bork* at 240-43. Nonetheless, we believe that other arguments (such as those related to economic price discrimination) tend to be inconclusive in respect to anti-competitive effects. *See* 3 *Areeda & Turner* ¶¶ 725e-725f, at 201-04; *R. Bork* at 241-42. We therefore believe that the two arguments just given are the most important of those that favor prohibiting a price squeeze; and we are willing to assume they would justify such a prohibition were there nothing to be said in favor of permitting prices that could create such a squeeze.

There are, however, at least two traditional circumstances in which prices that create a squeeze might simultaneously bring about economic benefits. First, the primary-level monopolist might carry out its second-level activities more efficiently than its independent competitors. If so, prices that squeeze the less efficient second-level competitors, even to the point of forcing them from the business, could (by lowering costs) lower prices, or, in any event, save economic resources. *See* 3 *Areeda & Turner* ¶ 725d, at 201 ("Whenever vertical integration produces new efficiencies, some of the cost savings . . . [will] be translated into a price reduction and . . . [will] save productive resources."); *R. Bork* at 243.

Second, prices that squeeze a "second-level" firm will benefit consumers whenever the "second-level" firm *is itself* a monopolist. *See Fishman v. Estate of Wirtz*, 807 F.2d 520, 563 (Easterbrook, J., dissenting) ("That successive monopolies injure consumers is a proposition on which there is unanimous agreement") (collecting authority). If, for example, ingot costs $40, the fabricating process costs $35, and the profit-maximizing price for sheet is $100, an ingot monopolist will charge $65 for the ingot, hoping that competition at the fabricating level will keep the total price at $100. If a different, independent monopolist dominates the fabricating level, however, that independent monopolist buying ingot at $65 will mark

up the price by more than $35, because he wants to earn monopoly profits as well. The result will be a market price of more than $100, resulting in smaller monopoly profits overall (for the final price is too high), but greater profits for the second monopolist than if he sold sheet for only $100. (Appendix B to this opinion contains a numerical example that may help the interested reader understand intuitively why this is so.) Under these circumstances, entry by the ingot monopolist into the sheet-fabrication level—even by means of a price squeeze—will help the consumer by limiting the final price of sheet to $100. *Cf. Atlantic Richfield Co. v. USA Petroleum Co.*, —— U.S. ——, 110 S.Ct. 1884, 1891, 109 L.Ed.2d 333 (1990) ("When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an 'anticompetitive' consequence of the claimed violation." (footnote omitted)); *see generally* 3 *Areeda & Turner* ¶ 725c, at 200-01.

Again, the price squeeze may have additional benefits, *see generally* 3 *Turner & Areeda* ¶¶ 725e-725f, at 201-04, and one can debate the empirical significance of those we have mentioned. But we believe that the two examples we have given show that prices that create a squeeze can, at least sometimes, have important beneficial effects.

Finally, we note that it is not easy for courts to administer Judge Hand's price squeeze test. That test makes it unlawful for a monopolist to charge more than a "fair price" for the primary product while simultaneously charging so little for the secondary product that its second-level competitors cannot make a "living profit." *See Alcoa*, 148 F.2d at 437-38. But how is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and de-

mands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price "gap?" Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?

We do not say that these questions are unanswerable, but we have said enough to show why antitrust courts normally avoid direct price administration, relying on rules and remedies (such as structural remedies, *e.g.*, prohibiting certain vertical mergers) that are easier to administer. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S.Ct. 377, 379, 71 L.Ed. 700 (1927) (observing that "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow"); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898) (Taft, J.) (stating that to inquire into the reasonableness of prices is to "set sail on a sea of doubt"), *aff'd*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899); 3 *Areeda & Turner* ¶ 701, at 148-50 ("The courts correctly regard as uncongenial and foreign to the Sherman Act the burden of continuously supervising economic performance.").

To reach *Alcoa*'s conclusion that the price squeeze is exclusionary, one must believe that the anticompetitive risks associated with a price squeeze outweigh the possible benefits and the adverse administrative considerations. We do not question that conclusion here, but we qualify it by noting that the harms and benefits (including the more doubtful ones we have glossed over, *see generally* 3 *Areeda & Turner* ¶¶ 725e-725f, at 201-04), are closely balanced. In light of this close balance, we should not blindly and automatically apply *Alcoa's* price squeeze rules in the presence of significantly different economic circumstances such as full economic regulation.

B. Price Squeeze Liability in a Regulated Industry

Full price regulation dramatically alters the calculus of antitrust harms and benefits. First, regulation significantly diminishes the likelihood of major antitrust harm. In particular, it diminishes the likelihood of "entry barrier" harm, namely the risk that (1) prices will rise because (2) new firms will hesitate to enter a market and compete after (3) a squeeze has driven pre-existing independent competitors from the marketplace. All three propositions are made doubtful by regulation. For one thing, in a regulated industry, regulators control prices directly. Statutes typically require regulators to maintain prices at "reasonable" levels. *See, e.g.*, 16 U.S.C. §§ 824d(a), 824e(a) (an electric utility's rates must be "just and reasonable"); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 288, 88 L.Ed. 333 (1944) (A "reasonable" rate is one that permits the firm to recover its costs and earn a reasonable profit); *see generally* J. Bonbright, A. Danielsen & D. Kamerschen, *Principles of Public Utility Rates* (2d ed. 1988) (describing ratemaking principles) [hereinafter *J. Bonbright*].

For another thing, factors related to regulation, such as the economic ability of a market to support new entry, or the legal requirement that a firm secure permission to enter, are likelier to determine new entry into a regulated industry than is a new entrant's fear of a two-level monopolist's enhanced retaliatory power. After all, should the regulator decide that new entry is warranted, it typically has the legal authority to prevent an existing "two-level" monopolist from improperly disadvantaging a new "second-level" competitor by, say, refusing to deal to with it or by charging unreasonably high prices. *See, e.g.*, 16 U.S.C. §§ 824f, 824i-824k (authorizing FERC to order interconnections, sales and wheeling of electricity among utilities); *see also* 2 A. Kahn, *The Economics of Regulation* 113-172 (discussing the concept of "natural

monopoly") [hereinafter *A. Kahn*]; *Meeks*, 72 Colum. L.Rev. at 95 & n.135 (noting that utilities in "all but a handful of states . . . must obtain a certificate of public convenience and necessity to serve an area" with electricity) (collecting statutes).

Finally, regulation in the electricity industry makes it less likely that a price squeeze will actually drive independent distributors from the marketplace. Local electricity distribution, after all, is itself considered a "natural monopoly" with service typically provided by a single franchised company to relatively immobile customers. *See Joskow* at 178; *cf. Otter Tail*, 410 U.S. at 369, 93 S.Ct. at 1025. Higher wholesale electricity prices (or lower retail prices elsewhere) will not lead the entire towns of Wellesley and Concord to pull up stakes and move to Dover. And the record lacks convincing evidence that competition between Edison and the plaintiff towns for customers living on the towns' borders, or for mobile high-energy-consuming industrial customers, is sufficiently important to threaten the plaintiffs with bankruptcy should such users switch to Edison. *Cf. Joskow* at 209-13 (arguing that, as a rule, there is little actual competition between electricity distributors). Even if an integrated utility such as Edison managed to set prices that severely squeezed a distributor, it could not take over the municipality's distribution area without the regulator's permission. *See, e.g.*, M.G.L. ch. 164 § 68 (Massachusetts municipality may not sell its distributorship without regulatory approval).

Second, regulators try to set prices that reflect costs. To the extent that they succeed, an integrated utility's prices are likely to squeeze independent distributors who buy from it at wholesale only if those distributors operate less efficiently, *i.e.*, at higher cost. Consequently, a rule preventing prices that create a squeeze will more likely discourage efficient operations and deprive consumers of prices that reflect lower costs.

Third, for institutional reasons, an antitrust rule making the price squeeze illegal threatens consumers. The plaintiffs say that Edison violated the antitrust laws by *asking* for rates (*i.e.*, *filing* rate proposals) that would produce for Edison a "higher return" on its "wholesale sales than. . . . on its retail sales." *See* Appellee's Brief at 4-8, 35-36. Other courts considering price squeeze claims have also emphasized that the alleged antitrust violation consisted of proposing or requesting rates that would narrow the gap between wholesale and retail rates so as to squeeze existing retail competitors. *See, e.g., City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1179 (8th Cir.1981) ("[T]he question" in a price squeeze case is "whether the defendant utility acted illegally *in proposing* a certain anticompetitive combination of rates") (emphasis added), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 814, 74 L.Ed.2d 1013 (1983); *City of Newark v. Delmarva Power & Light Co.*, 467 F.Supp. 763, 768 (D.Del. 1979) (chief allegation in price squeeze case was that defendant "used its power to *initiate* rates . . . to attempt to obtain an anticompetitive rate structure") (emphasis in original). A rule that penalizes the filing of wholesale rate increases would not necessarily lead firms to abandon wholesale rate increases; it could, instead, simply lead them to seek a retail rate increase whenever they seek a wholesale rate increase. (Conversely, it would discourage a utility from conceding that a retail price cut is reasonable unless it is also prepared to concede that a wholesale price cut is reasonable.) In this case, for example, the rule might have permitted Edison to escape liability by filing (or perhaps obtaining) a rate increase in the 39 cities and towns where it distributes electricity itself. Indeed, the rule would encourage Edison to seek a retail rate increase so high that a jury could not find the wholesale/retail gap too narrow. Such a rule of law (which could lead to unnecessary regulatory proceedings and unnecessary rate increases) would seem to w rk at cross-purposes with basic antitrust objectives. *Cf. Matsushita*

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S.Ct. 1348, 1360, 89 L.Ed.2d 538 (1986) (warning courts against adopting rules or practices that "chill the very conduct the antitrust laws are designed to protect"); *Barry Wright*, 724 F.2d at 234 ("[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.").

Fourth, an anti-price-squeeze rule, particularly the "equal profit earned at both levels" rule that plaintiffs advocate, presents special administrative difficulties in the regulatory context. For one thing, the Constitution guarantees a regulated firm a reasonable return on its investment, *see Hope Natural Gas Co., supra; Bluefield Water Works v. Public Serv. Comm'n*, 262 U.S. 679, 690, 43 S.Ct. 675, 678, 67 L.Ed. 1176 (1923); *see also* 16 U.S.C. §§ 824d(a), 824e(a) (rates must be "just and reasonable"). May courts prevent a utility from asking the regulator for a rate increase should the utility believe that current wholesale returns are, constitutionally speaking, too low? Similarly, what if the utility believes that different risks at different levels of the industry call for somewhat different rates of return?

For another thing, how will juries decide the amount of the firm's investment on which the "rate of return" is calculated? Profit, after all, is a return on a certain amount of investment. Much electricity investment is used to serve *both* wholesale and retail services. Accounting systems for allocating investment between different services or customer classes are notoriously complicated and sometimes arbitrary. *See J. Bonbright* at 495 (noting that dozens of schemes exist for allocation investment among customer classes) (collecting sources); *Joskow* at 180 ("Despite the legal distinction between 'retail sales' . . . and 'wholesale sales,' . . . essentially there is no functional distinction between generation and transmission facilities dedicated to retail and wholesale transactions.").

Will juries be permitted to "second guess" the regulator's allocation rules or its specific investment allocation decisions? Is the jury (as may, in a sense, have occurred here) to be permitted to decide that the utility's allocation (following Commission allocation procedures) of, say, $100 million investment to distribution and $400 million to wholesale, should have been $200 million/$300 million instead (in which case, of course, the pre-existing 10% profit earned at each level would look like 5% earned at retail and 13% at wholesale). What antitrust benefit would be gained by permitting juries to speculate in this way? Would not the results likely be arbitrary? For that matter, what antitrust benefit would be gained by a rule that freezes prices at levels designed to produce "equal profit rates" using some historically based commission-approved system for allocating investment? Any such court involvement in the rate-setting process could easily discourage utilities from proposing, and commissions from considering, such innovative, economically based, energy-conserving pricing systems as off-peak pricing (charging higher prices for electricity used during peak periods), incremental-cost pricing (charging prices for certain services reflecting the higher costs of hypothetical new construction), or even traditional Ramsay pricing (tailoring rates to reflect the comparative likelihood that higher rates will force customers to discontinue service); for there is no particular reason to believe that such rates would (or would not) reflect "equal" profits according to some particular prior, historical, commission-approved system for allocating investment. *See generally* 1 *A. Kahn* 87-103. At best, permitting judges and juries to speculate in this area would force regulators continually to revisit prior investment-allocation rules and would discourage regulatory efforts to develop (often with a utility's help) a set of economically rational pricing practices—which, after all, is a common objective of antitrust law and regulation.

Fifth and finally, a distributor who disagrees with the utility's, or the commission's, cost-allocation methods or with its rates, or who believes that a price squeeze will harm it (whether or not the price squeeze also harms the competitive process), has an administrative remedy. It can challenge a utility's rates and practices before the Commission as unjust, unreasonable, or "discriminatory." *See* 16 U.S.C. §§ 824d(a, b), 824e(a); 18 C.F.R. § 2.17 (a) (1990). As part of its challenge, it can ask the Commission to consider the alleged price squeeze harm. *See FPC v. Conway*, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976). If FERC permits the rates to take effect after suspension and later determines that a price squeeze exists, it can order an appropriate refund.

In sum, the relevant antitrust considerations differ significantly, in degree and in kind, when a price squeeze occurs in a fully regulated as opposed to an unregulated industry. Indeed, these considerations, which are closely balanced in the ordinary price squeeze, change so significantly when the squeeze takes place in a fully regulated industry that, in our opinion, the legal consequences of the squeeze change as well. That is to say, a price squeeze in a fully regulated industry such as electricity will not normally constitute "exclusionary conduct" under Sherman Act § 2.

We are aware that reported opinions in three circuit courts of appeal and several district courts suggest that a price squeeze may be unlawful in the regulated electricity industry. *See City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir.1982), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 814, 74 L.Ed.2d 1013 (1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir.1981); *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976 (7th Cir.1980) (*Mishawaka II*), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 892, 66 L.Ed.2d 824 (1981); *see also City of Newark v. Delmarva Power & Light Co.*, 467 F.Supp. 763 (D.Del.1979); *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F.Supp.

1343 (W.D.Pa.1979), *later proceeding*, 570 F.Supp. 553 (1983); *City of Batavia v. Commonwealth Edison Co.*, No. 76-C-4388, slip op. (N.D.Ill. Jan. 16, 1984). In only one of those cases, however, did the court actually enter, or affirm, a judgment against the defendant; thus, there is extremely little case law *holding* that a public utility price squeeze is exclusionary. Moreover, in all of the cases we have cited, the price squeeze allegation was but one of several allegations of several different kinds of "exclusionary conduct," and the one court that affirmed a Sherman Act § 2 judgment against a utility stressed that it might well *not* have done so had the price squeeze stood alone (as it does in the case before us). *See Mishawaka II*, 616 F.2d at 986 (suggesting that "no one aspect [of the defendant's conduct] standing alone is illegal"). Further, in every case, the price squeeze allegation involved wholesale prices that *exceeded* retail prices, (a matter here in doubt), thereby eliminating some of the "administrative" problems we have found surrounding a jury's efforts to determine the reasonableness of the price "gap." *See City of Mishawaka I v. Indiana & Michigan Electric Company*, 560 F.2d 1314, 1316 (7th Cir.1977) (wholesale price to municipalities "substantially higher" than retail price to industrial customers, threatening municipalities with "financial extinction"); *City of Kirkwood*, 671 F.2d at 1176; *City of Groton*, 662 F.2d at 925; *City of Newark*, 467 F.Supp. at 766; *Borough of Ellwood City*, 570 F.Supp. at 557; *City of Batavia*, *supra*. Thus, technically speaking, our holding is consistent with these other cases. Indeed, since we cannot find significant evidence that Edison's price squeeze deprived plaintiffs of a "living profit" (for the plaintiffs earned substantial returns, and even increased their sales, during the price squeeze period), our holding is arguably a consistent application of the rule set forth in *Alcoa* itself.

Nevertheless, we recognize that our reasoning and analysis differs significantly from that in the opinions

(other than *Alcoa*) just cited. We have carefully considered these differences and have found nothing to convince us that our analysis is incorrect. Even so, we have limited our holding by stating that "normally" a price squeeze will not constitute an exclusionary practice in the context of a fully regulated monopoly, thereby leaving cases involving exceptional circumstances for another day. And we have stressed that our reasoning applies with full force only when the monopolist who engages in the squeeze is regulated at both industry levels. We recognize that a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first. *See* 3 *Areeda & Turner* ¶ 726e, at 217-20.

III

Monopoly Power

A second, legally fatal problem with plaintiffs' case is that they failed to show that Boston Edison possessed monopoly power in the relevant market. As we have repeatedly pointed out, the traditional, *Alcoa*-type price squeeze occurs when a monopolist uses its control over the *monopolized* product (*e.g.*, ingot) to obtain a monopoly at a second industry level (*e.g.*, sheet). In this case, it is undisputed that Boston Edison has a (lawful) monopoly at one level of the electricity industry, namely transmission, for a given area normally can support only one transmission system, *see, e.g., Meeks*, 72 Colum.L. Rev. at 87, and Edison owns the transmission grid covering the area that includes Concord and Wellesley. The plaintiffs, however, cannot show (indeed, with one exception, they do not try to show) that Boston Edison used its control of electricity *transmission* to their disadvantage. To the contrary, the record clearly demonstrates that Boston Edison will "wheel" (*i.e.*, transmit) electricity from other producers to any distributor upon re-

quest, all for a nominal transmission charge that no one claims is unreasonably high. *See* Record Appendix at 1442, 1451-52, 1704-05 [hereinafter *App.*]. Indeed, Concord and Wellesley buy some of their electricity from the New York Power Authority, which wheels that electricity over Edison's lines, and at least half a dozen municipal distributorships use Edison's lines to obtain *all* of their electric power from non-Edison sources. *See App.* at 1449-50. Concord is a member of NEPOOL, all of whose members have interconnected lines, used to transfer electricity freely among them; and the record suggests that Wellesley is free to join NEPOOL should it wish to do so. The only arguably contrary evidence in the record consists of Concord's claim that Boston Edison refused to connect it to a 115 kv line; but the record does not (1) suggest that Concord needs that connection to buy electricity elsewhere, (2) indicate that the dispute concerns anything other than the connection price, or (3) show that the demanded connection price was unreasonably high.

At the same time, the record fails to show that Edison had monopoly power at the *generation* level, the industry level at which plaintiffs claim Edison charged too high a rate. To the contrary, the record shows that more than a dozen different power generating companies sell wholesale power in New England and that this power flowed freely among NEPOOL members. It shows that municipalities near Concord and Wellesley, municipalities to the north, south, east, and west of Concord and Wellesley, bought their electricity from production companies other than Boston Edison. It shows that Boston Edison's electricity production accounted for less than 12% of the electricity produced by these New England utilities. These facts and figures suggest that Boston Edison is far from attaining the 70% to 90% of the sales in a well-defined marketplace that Judge Hand (and later commentators) thought indicative of monopoly power. *See, e.g., Alcoa,* 148 F.2d at 424 (stating that a 90% market

share "is enough to constitute a monopoly" but that 60% is probably, and 30% is "certainly," not enough); *City of Mount Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 279-80 (8th Cir. 1988) (electricity suppliers accessible via wheeling must be included in wholesale market); *Lopatka*, 31 U.C.L.A.L. Rev. at 611 (arguing that the geographic market for wholesale electricity "include[s] all generation sources from which the municipality could obtain power at relatively insubstantial wheeling costs").

In their efforts to show monopoly power at the generation level, the towns point to three pieces of evidence. First, they say that Concord had a study made "which concluded that it was not economically feasible for the Town . . . to obtain its power requirements from non-Edison sources. . . ." The study in question, however, says that "the reason" the town will have lower power costs in the long run by buying from Edison is that Edison's "rate is based on embedded resources which are lower priced than the new units with which" the town would have to "meet its power supply requirements" if it stopped buying from Edison. This "reason" does not show that Edison has monopoly power. It shows only that Edison can charge lower prices because it bought its generating equipment at older, cheaper prices, (rather like a wheat farmer who, having purchased unusually fertile land long ago, could now sell wheat at lower prices or earn higher profits than other farmers, even in a highly competitive wheat market). In a competitive market a firm that bought older, cheaper generating equipment would simply charge the higher prices that the cost of new, expensive equipment requires its competitors to charge and it would pocket the difference. In a regulated market, the regulator forces the "historically lucky" firm to pass along some, or all, of this potential extra profit to its customers in the form of lower prices. In either case, the "extra" profit resulting from lower costs is not a monopoly profit. It is called an "economic rent." And its presence is consistent with a perfectly competi-

tive marketplace. *See* 2 *Areeda & Turner* ¶ 510, at 33-34; P.A. Samuelson, *Microeconomics*, at 213-214, 635 (13th ed. 1989); G. Stigler, *The Theory of Price*, at 258-63 (4th ed.1987). Concord's study, which relates Edison's superior performance to cost advantages, is not evidence that Edison has market power.

Second, plaintiffs point to a provision in Edison's tariff that states that, if they wish to buy power from other firms, they must either (1) give Edison five years advance notice, or (2) compensate Edison for any adverse impact Edison suffers in the subsequent three years. We need not explain all the reasons why this provision does not show that Edison possesses monopoly power, however, because, at a minimum, the record does not show that the tariff either unreasonably, or significantly, limits a customer's ability to buy from others. To the contrary, the plaintiffs have bought power from non-Edison sources, namely the New York Power Authority, despite the provision. And the plaintiffs remain free to challenge before FERC any unreasonably high charge that Edison might try to assess under this provision.

Third, the plaintiffs argue that the kind of electricity supply service they need—a firm commitment by a generating source to supply their full requirements—was simply unavailable from any firm other than Edison; hence, Edison had "monopoly power" over the price of this particular kind of service. Plaintiffs offered three pieces of evidence to support this contention: (1) John O'Neil, superintendent of the Concord light plant, in response to the question, "Was there any other firm requirements power available for Concord to purchase from utilities other than Boston Edison?," answered, "Not to my knowledge, no, sir." (2) Maurice Berdan manager of the Wellesley light plant, in response to the question, "Is there any other source of firm requirements wholesale power available to the Town of Wellesley other than Boston Edison Company?", answered (over an objection

that the answer "appears to call for an expert opinion and/or for hearsay"), "We had consultants look at it, and I have also had discussions with other people in the industry that we have not found any other sources of power, firm requirements power, that would be available . . ." and it was "public knowledge in the industry that firm requirements power is not available." (3) The minutes of the March 10, 1987 Concord Municipal Light Board meeting report,

> A question was raised as to whether or not Concord could become a customer of New England Power. It was stated that the 'NEES Plan' does not include new large power loads; Princeton's request to return to all-requirements status was rejected.

We do not think this evidence sufficient to show that Edison possessed "monopoly power" with respect to "firm requirements" contracts to supply electricity. For one thing, we do not see how a reasonable juror could conclude from this testimony and minutes that no firm other than Edison would sell "firm requirements" electricity at a price that roughly reflected current production costs. After all, the record is filled with evidence that other municipal distributors bought electricity from other suppliers. Both town witnesses were testifying in the context of a report (discussed at p. 30, above) that said it was less *economical* for the towns to buy electricity elsewhere than from a utility that had especially low historical costs. Neither town witness had himself tried to obtain a "firm requirements" contract for electricity (indeed, Mr. O'Neill conceded that he had "never talked to another utility besides Boston Edison on behalf of Concord"). And neither town witness made clear either the specific basis for his conclusion, nor, for that matter, did either witness say that he meant it was *not possible* to find an alternative supplier at prices reasonably close to current costs of production. To the contrary, David Foote, an Edison witness, who worked for a group of

New Hampshire utilities, stated that he had contacted three New England utilities (other than Edison) during the period in question and found that one of them would enter into a "firm requirements" contract to supply electricity.

For another thing, as we explained above, a simple showing that Edison offered a "firm requirements" contract (or any other type of contract) for power *more cheaply* than alternative suppliers does *not* show that Edison had monopoly power. Monopoly power is the power to raise price well above competitive levels before customers will turn elsewhere. *See generally* 2 *Areeda & Turner* ¶¶ 501-506, at 322-29. The plaintiffs' evidence shows neither that Edison's rates were significantly lower than the rates of others, nor that any such lower rates reflected anything other than lower costs; and the latter, as we explained earlier, is evidence only of an economic rent, not of monopoly power. *See* p. 30, *supra*. In the face of these economic facts, and other evidence in the record, the three pieces of evidence cited are simply too skimpy to support a "monopoly power" conclusion.

Finally, even though classical price regulation rests upon the premise that the regulated firm maintains a "natural monopoly," we resist any temptation to permit a jury to infer monopoly power from the mere fact of wholesale rate regulation itself. Whatever the historical basis for such regulation, today there is a growing conviction among students of the subject that the electricity generation business (as opposed to the transmission and distribution business) may be able to support several competing firms. *See, e.g.*, P. Joskow, *Regulatory Failure, Regulatory Reform and Structural Change in the Electric Power Industry* in *Brookings Papers: Microeconomics 1989* at 189-90 (1989); R. Pierce, *A Proposal to Deregulate the Market for Bulk Power*, 72 Va.L.Rev. 1183, 1212-15 (1986).

For these reasons, we do not believe plaintiffs met their burden of providing evidence from which a jury

could find that Edison had significant monopoly power in the relevant market, *i.e.*, the power to raise price significantly higher than the cost-based level that competition would otherwise bring about.

The judgment of the district court is

Reversed.

APPENDIX A

We offer the following highly simplified intuitive explanation of the "single monopoly profit" argument, based upon an example given by Professors Areeda and Turner.

> Assume that copper is used only to produce pipe. Assume that the industry has two "levels:" (1) refining ore into copper ingot and (2) fabricating ingot into pipe. Assume the profit-maximizing price for copper pipe is $100. (Charging more would reduce pipe sales to the point where the monopolist would earn less profit; charging less would increase pipe sales, but not enough to make up for lost potential revenue on each sale.) Assume the cost (including a reasonable profit) of refining ore into ingot is $40. Assume the cost of fabricating ingot into pipe is $35.
>
> Suppose that the "ingot" stage of the industry is monopolized but the "pipe" stage is competitive. An ingot monopolist would charge $65 for its ingot; it would rely upon competition among pipe fabricators to keep the mark-up at $35 and the fabricated-pipe price at $100; and it would pocket $25 ($65 minus $40) of monopoly profit.
>
> Suppose, instead, that the "ingot" stage of the industry is competitive but the "pipe" stage is monopolized. Competition at the "ingot" stage would produce an ingot price of $40. The pipe monopolist would buy the ingot for $40; it would sell the fabricated pipe for $100; and (after subtracting the $40

cost of ingot and $35 cost of fabrication) it would pocket $25 of monopoly profit.

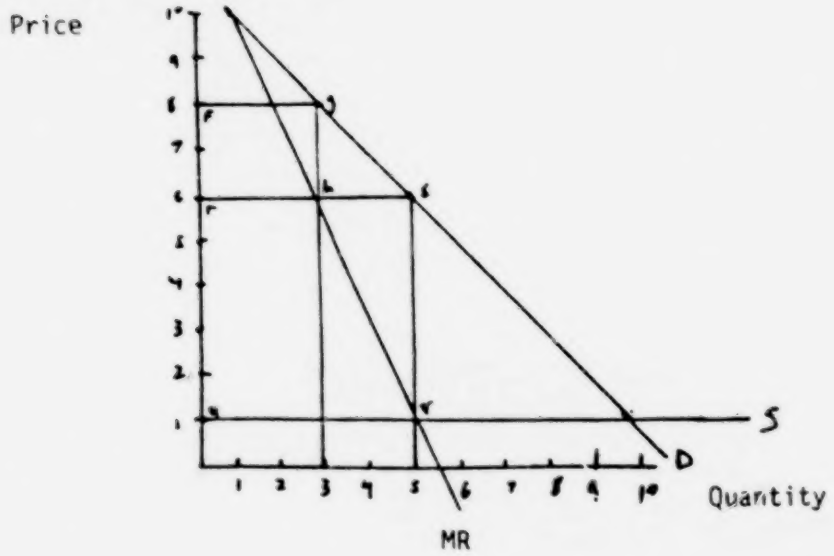
Now suppose a single, integrated firm managed to achieve a monopoly at *both* "levels" of the industry. It would sell pipe at the profit-maximizing price of $100. After deducting its total costs ($40 plus $35), it would pocket $25 of monopoly profit.

In each case, the profit-maximizing price remains $100 and the monopoly profit is $25. This normally will remain so as long as the manufacturing costs associated with ingot and pipe remain the same.

See 3 *Areeda & Turner* ¶ 728b, at 199.

APPENDIX B

This is a graphic and a numerical example offered to help provide an intuitive understanding of the possible price effect of having two separate monopolists at two different industry levels.



Price	Quantity	Total revenue	M's costs	M's profits	R's costs	R's profits
10	1	10	1	9	6	4
9	2	18	2	16	12	6
8	3	24	3	21	18	6
7	4	28	4	24	24	4
6	5	30	5	25	30	0
5	6	30	6	24	36	[negative]
4	7	28	7	21	..	..
3	8	24	8	16	..	..
2	9	18	9	9	..	..
1	10	10	10	0	..	..

It costs $1 to make a widget.

A single monopolist ("M") will maximize his profit by setting a price of $6 and selling 5 widgets. His profit is $24 (represented by the area "rstu").

If M sells widgets for $6 each to an independent retailer ("R") with monopoly power, R will maximize *his* profit by setting a price of $8 and selling 3 widgets. His profit is 6 (represented by the area 'rhgf"). M's best strategy is enter the retailing level of the industry and to set a final price of (roughly) $6.

APPENDIX B

UNITED STATES DISTRICT COURT
D. MASSACHUSETTS

Civ. A. No. 87-1881-C

TOWN OF CONCORD, MASSACHUSETTS and
TOWN OF WELLESLEY, MASSACHUSETTS,
Plaintiffs,

v.

BOSTON EDISON COMPANY,
Defendant.

Aug. 30, 1989

Charles F. Wheatley, Jr., Wheatley & Ranquist, Annapolis, Md., Neil Motenko, Charles R. Parrott, Nutter, McClennen & Fish, Boston, Mass., Albert S. Robinson (Town Counsel), Grindle, Robinson & Kertzman, Wellesley, Mass., for plaintiffs.

Robert J. Stillman, William G. Meserve, William L. Patton, Ropes and Gray, Boston, Mass., John Desmond, Wayne R. Frigard, Boston Edison Co., Boston, Mass., for defendant.

MEMORANDUM

CAFFREY, Senior District Judge.

This antitrust matter was tried before a jury during April and May 1989. After thirteen days of testimony, including that of expert witnesses for both the plaintiff Towns and the defendant Boston Edison, the jury deliberated for three days and, on special interrogatories, returned a verdict of $13.1 million for the plaintiffs.[1] Boston Edison now moves for judgment notwithstanding the

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[1] The jury found for the defendant on Count II, the Robinson-Patman Act claim.

verdict or, in the alternative, for a new trial. Although this case raises novel issues of law in this circuit, under the well-established criteria governing consideration of j.n.o.v. and new trial motions, the jury's verdict should not be disturbed.

I. *Background*

As briefly as possible, we begin by summarizing the relevant facts. The plaintiff Towns of Concord and Wellesley ("Towns") are municipal corporations which own and operate electric distribution systems and engage in the retail distribution of electric power. Defendant Boston Edison Company ("BE") is a vertically-integrated power company which generates, transmits, and sells electric power at both wholesale and retail. BE's retail rates are regulated by Massachusetts law and the Massachusetts Department of Public Utilities, while its wholesale rates are regulated by federal law and the Federal Energy Regulatory Commission ("FERC").

BE currently supplies approximately 95% of the Town's power needs. The remaining 5% is "wheeled" to the Towns by BE from the Power Authority of the State of New York ("PASNY"), also known as the New York Power Authority. Concord constructed its power plant in the late 1890s and Wellesley acquired its plant from a BE predecessor in 1906. Throughout most of this century the Towns negotiated what is known as "firm requirements power" contracts with BE. This type of contract provides that the utility company will meet all of the customer's electricity needs during the life of the contract. The Towns have no generating facilities or power lines of their own linking them to other generating facilities and have always relied on BE's transmission lines to bring electricity to their power plants.

In 1980, after the Towns had commenced litigation concerning an earlier disagreement regarding wholesale rates, BE and the Towns entered into a settlement agreement that provided, *inter alia*, that the Town's wholesale rates

would increase only when BE also increased its retail rates. *See Towns of Wellesley, Concord and Norwood v. Federal Energy Regulatory Comm'n*, 786 F.2d 463 (1st Cir.1986). *See also* 829 F.2d 275 (1st Cir.1987). This "sequencing" provision was contained in Article 3.4 of the settlement agreement. In January 1984, BE notified the Towns that it was cancelling Article 3.4. In February 1984, BE also announced it was cancelling Article 5.1 of the same agreement, which provided that the Towns' rates would remain constant so long as their "load factor" was 54% or greater. At about this same time, the Towns initiated negotiations with PASNY in order to take advantage of low-cost PASNY hydro-electric power that would become available in mid-1985. On July 1, 1985, the Towns began to receive approximately 5% of their power from PASNY, wheeled by BE through its transmission facilities.

In late 1984, BE filed a wholesale rate increase with FERC. The "S-8" increase, as it became known, contained two steps, A and B, and increased the Towns' wholesale rate a total of 8.5%. FERC permits wholesale rate increases to go into effect immediately, subject to later review and possible reduction and refund, if necessary. BE filed no corresponding retail rate increase, as the cancelled Article 3.4 had required. In January 1987, BE filed another wholesale rate increase, S8-PR, which raised wholesale rates an additional 4.4%. Meanwhile, the Tax Reform Act of 1986 had reduced BE's federal corporate tax rate. As part of this tax package, Congress mandated rate relief and, in 1987, BE reduced its retail rates—but not its wholesale rates—to reflect these tax savings.

After July 1, 1985, when the Towns began receiving 5% of their power from PASNY, BE continued to charge them as if they were receiving 100% of their power from BE. In 1986, BE sent the Towns a letter explaining that because the Towns had not given BE five years notice concerning their decision to take PASNY power, BE

would assess an "adverse financial impact" charge of almost $1 million against the Towns. Additionally, in late 1986 BE completed the construction of Transformer 110-C at Station 292 in Newton, which serves Wellesley, and sought FERC approval to charge Wellesley $761,000 for this new equipment. Eventually an administrative law judge determined that Wellesley was not responsible for any part of the cost of Transformer 110-C.

At trial, the Towns argued that these actions by BE constituted anti-competitive conduct in violation of section 2 of the Sherman Act and section 2(a) of the Clayton Act, codified at 15 U.S.C. § 2 and § 13(a), respectively. Specifically, the Towns charged that BE's wholesale rate increases created a "price squeeze" which forced the Towns to raise their retail rates, reduced the profit margin the Towns historically enjoyed, led to the delay of plant improvements and wage increases for employees, and generally reduced the Towns' ability to be competitive in attracting new, and retaining existing businesses and customers. The Towns also asserted that the wholesale rates BE charges them are effectively higher than what BE charges some of its larger retail customers. The Towns sought damages totalling at least $15 million.

BE now seeks a judgment notwithstanding the verdict or a new trial, arguing primarily that the Towns failed to prove that BE has monopoly power in a relevant market or the existence of a price squeeze, that BE's wholesale rate filings are protected by the *Noerr-Pennington* doctrine, and that there is no actual competition between the Towns and BE. For the reasons stated below, BE's motions should be denied.

II. *The J.N.O.V. and New Trial Motion Standards*

The principles governing consideration of a motion j.n.o.v. are by now familiar and

> well-settled in this circuit. The evidence must be viewed in the light most favorable to the plaintiff, giving him the benefit of every favorable inference

> that may be fairly drawn. If fair minded men may draw different inferences and reasonably disagree as to what the verdict should be, the matter is for the jury.

Borras v. Sea-Land Service, Inc., 586 F.2d 881, 885 (1st Cir.1978) (quoting *Dumas v. MacLean*, 404 F.2d 1062, 1064 (1st Cir.1968)). If, after reviewing the evidence and without weighing the credibility of the witnesses, "there is any substantial evidence supporting the verdict, judgment n.o.v. is improper." *Id.* (citing C. Wright, *Law of Federal Courts* § 95, at 473 (3d ed.1976)). "A jury verdict supported by the evidence may not be set aside simply because the judge would have reached a different result." *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield*, 692 F.Supp. 52, 65 (D.R.I.1988), *aff'd*, 883 F.2d 1101 (1st Cir.1989).

In *Freeman v. Package Machinery Co.*, 865 F.2d 1331 (1st Cir.1988), the court reviewed the principles governing consideration of a motion for a new trial:

> [T]he judge's prerogative to set aside a verdict crystallizes only if "it is quite clear that the jury has reached a seriously erroneous result." *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir.1978) (citations omitted). In our litany of cases, we have come to refer to this criterion as the "manifest miscarriage of justice" standard . . .

Milone v. Moceri Family, Inc., 847 F.2d 35, 37 (1st Cir. 1988). Put another way, the district court may order a new trial only if it is convinced that the jury's verdict is "against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice . . . ."

Id. at 1333 (citing *Coffran v. Hitchcock Clinic, Inc.*, 683 F.2d 5, 6 (1st Cir.), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 571, 74 L.Ed.2d 933 (1982); other citations omitted). Setting aside a jury verdict is thus an extraordinary remedy, as it invades "the jury's constitutionally sanc-

tioned role as finder of fact." *Mayo v. Schooner Capital Corp.*, 825 F.2d 566, 570 (1st Cir.1987). It is not enough that "a contrary verdict may have been equally—or even more easily—supportable . . . If the weight of the evidence is not grotesquely lopsided, it is irrelevant that the judge, were he sitting jury-waived, would likely have found the other way." *Freeman*, 865 F.2d at 1333-34. The jury's verdict against Boston Edison is not so grotesquely lopsided or unsupported by the evidence that it should be set aside.

III. *The Substantive Issues*

1. *The Relevant Market.* Defining the relevant market is key to establishing an antitrust violation under section 2 of the Sherman Act. A recent decision of the District Court of Rhode Island offers this succinct definition of the term:

> The terms "monopoly power" and "market power" are generally used interchangeably. "Monopoly power" is the power to control prices or exclude competition in a relevant market. The relevant market is the "area of effective competition" where the defendant operates. Relevant market is identified by the product and its interchangeability plus the geographic area. Usually the trier of fact defines the relevant market.

Ocean State Physicians Health Plan, 692 F.Supp. at 67 (citations omitted).

The Towns and BE both presented evidence concerning the relevant market. The Towns' experts defined the relevant market as BE's service area, where it provides electricity to customers at both retail and wholesale, and testified that BE controls 98% of that market. BE's experts defined the relevant market as the entire New England area and parts of New York and Canada, wherever wholesale electricity is available. According to this definition, BE's share is significantly less, amounting to just

15% of the wholesale market in New England. Based on this conflicting evidence and two special interrogatories which squarely addressed the issue,[2] it is clear that the jury performed its fact-finding function and there is sufficient evidence to support its determination.

Case law also supports this definition of the relevant market. The U.S. Supreme Court recognized a relevant market similar to the Towns' definition in *Otter Tail Power v. United States*, 410 U.S. 366, 369-70, 93 S.Ct. 1022, 1025-26, 35 L.Ed.2d 359 (1973) ("The aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the towns at retail. That competition is generally for the right to serve the entire retail market within the composite limits of a town, and that competition is generally between Otter Tail and a prospective or existing municipal system . . . [of these towns] Otter Tail serves 91% . . . ."). The Tenth Circuit has also implicitly done so in *City of Chanute v. Kansas Gas & Elec. Co.*, 754 F.2d 310 (10th Cir.1985), *aff'g* 564 F.Supp. 1416 (D.Kan.1983) ("cities and KG & E operate in the retail electric market, are in geographic proximity, and desire to have new customers locate within their respective service areas. As such, they are in competition."). And finally, the Seventh Circuit adopted a similar definition in *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976 (7th Cir.1980), *aff'g* 465 F.Supp. 1320, 1325 (D.Ind.1979) ("It is clear that the relevant product market is electric power and energy . . . 'The geographic location of the market is usually determined by an examination of the areas in which the particular firm actually competes or operates. If it concentrates its sales and service in one area, this area will normally be the relevant market.' "). There is nothing contradictory in the recent decision in *Borough*

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[2] Special questions numbers 1 and 2 asked: "Do you find that plaintiffs proved the existence of a relevant market?" and "Do you find that defendant had monopoly power in the relevant market?" The jury answered "Yes" to both questions.

of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307 (3d Cir.1982). In *Lansdale* the Third Circuit explicitly stated that defining the relevant market is a factual matter for the jury, thus rejecting the plaintiffs' argument that the relevant market should, as a matter of law, be considered the utility's service area. This is the exact procedure followed in the case at bar. In addition, unlike in *Lansdale*, substantial evidence exists here to support the jury's definition of the relevant market.

In conformity with these cases, the Towns presented substantial evidence from which the jury could conclude that the relevant market is BE's service area, and that BE has monopoly power in this market. Monopoly power in itself is not problematic, of course. The Towns must also prove by a preponderance of the evidence that BE "willfully acquired or maintained that power through restrictive or exclusionary conduct" and that the Towns were "injured in [their] business or property because of [BE's] restrictive or exclusionary conduct." *Ocean State Physicians Health Plan*, 692 F.Supp. at 67 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966)). In order to determine whether the Towns suffered any injury to their business or property, we turn to BE's next argument.

2. *The Price Squeeze.* The Towns presented evidence of their injuries in the form of expert testimony concerning a price squeeze resulting from the interplay of BE's wholesale and retail rates. Essentially, BE argues that because FERC eventually determined a "just and reasonable" wholesale rate for the period covered by the S-8 filing, this rate cannot possibly subject BE to antitrust liability. The jury's verdict, in BE's view, "makes a shambles of the regulatory scheme."

It is necessary to place this argument in its proper context. In 1972 the U.S. Supreme Court rejected a similar argument:

> Otter Tail contends that by reason of the Federal Power Act it is not subject to antitrust regulation with respect to its refusal to deal. We disagree with that position.
>
> "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." . . . Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.

Otter Tail Power Co., 410 U.S. at 372, 93 S.Ct. at 1027 (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 1734-35, 10 L.Ed.2d 915 (1963)). This basic principle was restated more forcefully in 1976:

> Indeed, since our decision in *Otter Tail Power Co.* . . . there can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities.

Cantor v. Detroit Edison Co., 428 U.S. 579, 596 n. 35, 96 S.Ct. 3110, 3120 n. 35, 49 L.Ed.2d 1141 (1976). Subsequent case law has further refined how this principle operates in a dual-regulation setting, where retail rates are regulated by the state and wholesale rates by FERC. As the Eighth Circuit has described the problem, "the FERC and [the state] each has authority over only one end of the alleged price squeeze, while the antitrust laws can address the entire problem." *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1178 (8th Cir.1982), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 814, 74 L.Ed.2d 1013 (1983). Furthermore,

> [e]nforcing the antitrust laws is not the FERC's paramount objective, and the only remedy the FERC can grant is to reduce the wholesale price to the lower end of the "zone of reasonableness," . . . which, de-

> pending on where the retail price is set, may or may not be enough to eliminate the price squeeze.

Id. (quoting *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 279, 96 S.Ct. 1999, 2004, 48 L.Ed.2d 626 (1976)). After considering arguments identical to those advanced by BE, the Eighth Circuit concluded:

> In sum, the courts may consider a price-squeeze claim without infringing on the regulatory jurisdiction of the FERC and [the state], because the question is not whether the rates themselves are anticompetitive, but whether the defendant utility acted illegally in proposing a certian anti-competitive combination of rates.

Id. at 1179.

As a matter of law, therefore, BE's price squeeze argument is incorrect. Because the Towns presented substantial evidence concerning the effect of the price squeeze on their profit margin, plant improvement, wages, and so on, we find no ground here for disturbing the jury's verdict.

3. *The Noerr-Pennington Doctrine.* Incredibly, BE asserts that the jury's verdict must be overturned on the basis of the *Noerr-Pennington* doctrine, which protects the first amendment right to make one's views known to the government. BE's argument that *Noerr-Pennington* insulates its rate filings from the antitrust laws has been soundly rejected by numerous courts. *See, e.g., Cantor v. Detroit Edison Co.*, 428 U.S. at 601-02, 96 S.Ct. at 3122-23 ("[N]othing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff . . . is a sufficient reason for conferring antitrust immunity on the proposed conduct."); *City of Kirkwood*, 671 F.2d at 1181 ("The *Noerr-Pennington* doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results. It is not for expression

of opinion that Kirkwood seeks to compel UE to respond in damages, but rather for UE's conduct in the market place."); *City of Mishawaka*, 616 F.2d at 982 ("It appears to us that the municipalities are not barred by *Noerr-Pennington* . . . Were we to view it otherwise, the federal and state regulatory processes would provide the utility with a method of effectively advancing its illegal monopolistic purposes while maintaining an outward appearance of total innocence and shielded from the Sherman Act"). We need go no further. The *Noerr-Pennington* doctrine simply does not apply to the case at bar.

4. *Competition.* BE also argues that there is no evidence in the record of "actual" competition between it and the Towns. Admittedly, "[i]t is inherently difficult to define competition in the electric-power industry. . . ." *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 930 (2d Cir. 1981). Numerous courts have confronted the issue, however, and the most widely accepted definition of competition in this setting is derived from *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F. Supp. 1343, 1346 (D. Pa. 1979):

> Not only does Penn Power sell power to plaintiffs at wholesale rates, but it is also engaged in the retail distribution of power to customers in the area surrounding plaintiffs' service area . . . For practical purposes, competition between Penn Power and plaintiffs can be seen most strongly in the service of industrial and commercial customers having the option to locate in either the service area of Penn Power or that of plaintiffs . . . If the retail rates of plaintiffs and Penn Power differ, the location choice of the potential customer can be affected by the differential. Plaintiffs and Penn Power also compete, at least theoretically and on a long-term basis, for service areas. If plaintiffs were to become unable to serve their customers profitably, Penn Power would logi-

> cally be in the best position to assume plaintiffs' present service.

Id. As the Second Circuit observed, in this context FERC has recognized three types of competition:

> [c]ompetition for individual customers, including large industrial or commercial loads; franchise competition, for the right to serve all of the customers in a given territory . . .; and fringe area competition, for customers on the fringes of the present service areas of rival utilities.

City of Groton, 662 F.2d at 930. On facts similar to those of the case at bar, one court found as follows:

> The court is also persuaded that potential franchise competition is involved in this case, to the extent that any of the cities, as owners of unprofitable utility systems, would determine it necessary to discontinue operation of their independent systems.

City of Chanute, 564 F.Supp. at 1421.

In conformity with these definitions of competition, the Towns presented evidence and testimony concerning the negative impact of the wholesale rate increases (potential franchise competition); the importance of competitive retail rates to customers straddling the Towns' borders, such as Wellesley College (fringe area competition); and the similarity between the Towns' wholesale rates and the retail rates BE charges some of its large industrial and commercial customers (individual customer competition). BE offered evidence and testimony that disputed the existence of competition in these areas, and the jury's factual determination favoring the Towns is permissible.

5. *Miscellaneous Issues.* BE asserts that the Towns presented no "competent" evidence of damages. The Towns' expert, Dr. Wilson, did testify concerning his calculation of damages, just as BE's expert, Dr. Pace, testi-

fied that he could find no damages. In the words of the Third Circuit:

> The battle of experts was waged in the trial court before the jury. The jury resolved the factual dispute. What Lansdale lost, fairly and squarely, at the hands of a jury cannot be retrieved by converting a factual controversy into an issue of law.

Borough of Lansdale, 692 F.2d at 313. BE also argues that the jury instructions "materially prejudiced" BE's rights. We can only respond that we believe the jury instructions and the special questions accurately and exhaustively detailed the applicable law and those areas where the jury had to resolve factual issues, including the burden on each party. We find BE's remaining arguments unpersuasive.

IV. *Conclusion*

After careful review of the record, we find that substantial evidence exists to support the verdict, thus precluding BE's motion for judgment n.o.v. We also find that the evidence presented at trial is not so lopsided as to constitute a manifest miscarriage of justice, thus precluding BE's motion for a new trial.

So ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

89-1872

TOWN OF CONCORD, MASSACHUSETTS, *et al.*,
Plaintiffs, Appellees,

v.

BOSTON EDISON COMPANY,
Defendant, Appellant.

Before

Breyer, *Chief Judge*,
Campbell and Selya, *Circuit Judges*.

ORDER OF COURT

Entered: May 2, 1990

The parties are requested to brief the following two questions:

1. Can a "price squeeze" engaged in by an electric utility whose wholesale and retail prices are regulated ever amount to "exclusionary" or "unreasonable" conduct?

In answering this question, the parties should refer to the definition of "exclusionary" conduct set forth at 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 626 at 83 (1978), and adopted by this court in *Barry Wright*

Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983):

> 'Exclusionary' conduct is conduct, other than competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.

The parties should also refer to the definition of "unreasonable" conduct set forth in *Interface Group, Inc.* v. *Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir. 1987):

> '[U]nreasonableness' in antitrust law has a rather special meaning. It means that the anticompetitive consequences of a particular action or arrangement outweigh its legitimate business purposes. *See* 7 P. Areeda, *Antitrust Law* ¶ 1500, at 362-63 (1986). 'Anticompetitive' also has a special meaning: it refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962), a process that aims to bring consumers the benefits of lower prices, better products, and more efficient production methods.

See also Clamp-All Corp. v. *Cast Iron Soil Pipe Institute*, 851 F.2d 478, 486 (1st Cir. 1988); *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988); 3 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 723-729h, at 194-244; P. Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, in *Antitrust and Regulation* (F. Fisher ed. 1985).

2. If a "price squeeze" engaged in by a regulated utility can ever constitute "exclusionary" or "unreasonable" conduct, can it constitute such conduct (a) where the utility's retail rates are higher than its wholesale rates, *cf. City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976, 978 (7th Cir. 1980), or (b) where the "price squeeze" is not accompanied by other anticompetitive activity, *cf. id.* at 985-86; Joskow, *supra*, at 199?

The supplemental briefs of the parties will both be due on May 29, 1990.

By the Court,

Francis P. Scigliano
Clerk.